Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1997

JAMES A. McNAMARA, JOHN J. SULLIVAN, THOMAS R. MILLER, CHARLES W. LUX, WILLIAM T. KING, CHARLES E. DINEEN, RICHARD A. GRAF, HENRY T. SCAVONE AND PAUL B. SOBCZAK,

Petitioners,

v.

CITY OF CHICAGO, A MUNICIPAL CORPORATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

KIMBERLY A. SUTHERLAND
Counsel of Record
180 W. Washington St.
Suite 700
Chicago, IL 60602
(312) 726-0045
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether, in a reverse discrimination case, isolated incidents of uncongeniality, remote in time, and unrelated to the decision-making process for hiring or promotion, justified promotion quotas for blacks and Hispanics in 1991-92 to the rank of captain in the Chicago Fire Department (CFD), especially in light of the following circumstances:

   A. the CFD has engaged in targeted recruiting of blacks and Hispanics since the 1960's;

   B. in lawsuits brought by the United States, there were prior judicial determinations of *no* discrimination in hiring and promotion;

   C. the CFD has voluntarily imposed both hiring and promotion quotas since the 1970's;

   D. there was adverse impact on *whites*, not blacks or Hispanics, on the 1987 captains' test at issue.

2. Whether the lawful remedy for isolated incidents of uncongeniality was to pass over innocent, third-party, white males for promotion, decades after the incidents, or whether the narrowly tailored remedy would at most involve penalizing the discriminator and providing appropriate relief to the victim, and to explore race-neutral alternatives to increase minority representation.

3. Whether Hispanics should have been randomly included in promotion quotas.

4. Whether the inquiry into whether there is a strong basis in evidence to justify racial quotas is a question of law, not fact, subject to plenary review.

5. Whether all nine petitioners would have been promoted if promotions had been made in rank order, according to the law of mathematics.

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PETITION FOR A WRIT OF CERTIORARI

The McNamara petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit on issues of what constitutes a compelling governmental interest and narrowly tailored remedy under the equal protection clause, in a reverse discrimination case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 138 F.3d 1219 (7th Cir. 1998), and reprinted in the Appendix (App. 1). By order of April 21, 1998, and amended order of May 13, 1998, the Court of Appeals denied the petition for rehearing with suggestion for rehearing *en banc* (App. 30-31).

The opinion of the United States District Court is reported at 959 F.Supp. 870 (N.D.Ill.1997), and reprinted in the Appendix (App. 14).

JURISDICTION

On March 18, 1998, the Court of Appeals for the Seventh Circuit entered the judgment sought to be reviewed. By order of April 21, 1998, and amended order of May 13, 1998, the Court of Appeals denied the petition for rehearing with suggestion for rehearing en banc. This Court has jurisdiction under 28 U.S.C. Sec. 1254(1).

STATEMENT OF THE CASE

The present nine petitioners, who were white male Chicago Fire Department (CFD) lieutenants, were passed over for promotion to captain in 1991-92, for non-rank order (NRO) promotions of blacks and Hispanics. The underlying 1987 captains' test had adverse impact on whites, not blacks, and the NRO promotions caused the selection rate of whites to be only 50% of the selection rates of blacks and Hispanics. (R. 136-2, Pl. Exs. 21-23, pp. 3-4)

A. History of hiring and promotion in the CFD

1. Prior judicial determinations

On November 21, 1973, in the case of *United States v. City of Chicago*, 73 C 661, United States District Court Judge Thomas McMillan found that pre-Act hiring (before Title VII applied to cities in 1972) was not intentionally discriminatory. Judge McMillan found that the 1968 CFD written hiring test, was job-related and its purpose was not to discriminate against blacks and Hispanics, although it was more difficult for blacks than whites. He found that similar preceding hiring tests correlated with success in the academy. (R. 91. Tab B, p. 2-4)

On March 26, 1979, in the same case, United States District Court Judge Frank McGarr found:

> "The disparity between whites and minorities in hiring and promotion within the Chicago Fire department has been acknowledged and, as to the numbers of supervisors, is largely the effect of pre-Act effective-date conduct which, in the context of this case, is a legal nullity. *United*

Airlines, Inc. v. Evans, 431 U.S. 553 (1977)" (R. 91 Tab M, p. 5)

On October 17, 1979, Judge McGarr entered final summary judgment against the United States, on remand from *U.S. v. City of Chicago*, 573 F.2d 416 (7th Cir. 1978), finding no intentional discrimination and no adverse impact on promotion tests in use from 1964 to 1978. (R. 91 Tab 0)

Hiring

The 1950's

In the 1950's, the black witnesses called by the City of Chicago (City) testified that they had initially waived the opportunity to be hired by the CFD, because the job was low-paying and not worth the dangers. At that time, factory work paid more than the CFD. (R. 150, T. 447, 491-92, 544-45) (R. 162-7, Edwards Dep. 18-19)

The 1960's

Prior to the 1968 entrance test, the City engaged in extensive recruitment targeted at blacks and Hispanics, and provided them help in taking the entrance exam. (R. 136-1, Pl. Ex. 4, Pounian affidavit, p. 7 and attached photograph)

For the 1968 entrance test, as stated above, Judge McMillan found that the percentage of black applicants was 20%, however, many blacks did not pass the entrance test because the written general aptitude test was too difficult for them. He found that CFD hiring tests that preceded the 1968 hiring test correlated with success in

the academy. He found that the 1968 hiring test was job-related and did not discriminate against blacks and Hispanics. He found Title VII did not apply retroactively to the continued use of the 1968 list in 1973, after the effective date of Title VII. (R. 91. Tab B, pp. 2-4)

The 1970's

For the next entrance test, the 1974 entrance test, the City again targeted extensive recruiting at blacks and Hispanics. All of the recruiters were black and Hispanic. (R. 136-1, Pl. Ex. 4, pp. 4-5) (R. 149, T. 234 Orozco) (R. 136-1, Soto Dep. pp. 89-91) (R. 141, T. 112-13, 194-195 Joyce)

The City lowered the CFD's height requirement, and dropped the citizenship requirement. (R. 136-3, Soto Dep. 91) (R. 162-1, Def. Ex. 12).

For the 1974 CFD hiring test, the City ranked eligibles according to a physical fitness test. The reading test was lowered to a level between the 6th and 9th grades, graded pass/fail. (R. 91, Tab E, p. 6) (R. 136-1, Pl. Ex. 8b) (R. 162-1, Def. Ex. 20, bates no. 011574)

There was no hiring in the CFD from 1974 to 1976. There was no evidence that the CFD failed to hire during that time to avoid hiring minorities, contrary to a clearly erroneous finding by the district court (App. 26).

In 1977, the City certified the first class from the 1974 list. The City hired blacks and Hispanics under 50% voluntary hiring quotas, hiring 253 firefighters for a February and April class, of which 197 were blacks and Hispanics. Many of the blacks and Hispanics were

selected in non-rank order. (R. 136-1, Pl. Ex. 8b, 1974 hiring list; R. 91, Tab J (attached 1977 certification list) (R. 136-1 Pl. Ex. 8a excluded from evidence)[1]

Promotions

Time to promotion

The City's "Arimond letter" showed that from 1950-1979 blacks spent less time in rank before promotion than whites. (document sealed, R. 96 in 87 C 7295, excluded from evidence)

The City's own expert, Dr. Gerry Suchanek, showed that this trend continued after 1979. He stated his data was accurate starting with 1983 data. (R. 151, T. 771-71) (R. 162-3 Def. Ex. 61) He showed that in 1987, black lieutenants had an average of 13.8 years on the job, compared to 15 years for white lieutenants, and black captains had an average of 14.6 years on the job, compared to 20.6 for white captains. In 1991-92, black captains had an average of 16.8 years on the job, compared to 21.3 years for white captains. (R. 162-3 Def. Ex. 61)

Efficiencies used for promotion scores

Court documents filed in *United States v. City of Chicago*, 73 C 661, show that for 12 of the 17 promotion tests used between 1960 and 1978, blacks had better average efficiencies than whites. On the remaining 5 tests, the

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[1] Exhibits designated as "excluded from evidence" were either the City's own documents, a demonstrative exhibit created from the city's own documents, or court orders. None of these exhibits should have been excluded.

efficiency ratings did not have a statistically significant impact on blacks in the results of any test. (R. 136-2, Pl. Exs. 11, pp. 3-5 & Ex. 11a., p. 6, excluded from evidence)

The disparate impact of the efficiencies used for the 1978 lieutenants' test, referred to by the district court (App. 25), had no effect, since minorities were promoted anyway, through quotas. After the 1978 tests, efficiencies were no longer used in promotion scores. (R. 141, T. 183-84, 189) (R. 152, T. 861-865)

Promotion exams

There was no "past use of discriminatory promotion tests" contrary to a clearly erroneous finding by the district court (App. 23).

Of the 17 promotion examinations given between 1962-1973, only 7 had adverse impact in pass rates on minorities, and only 1 had adverse impact in selection rates, namely, the 1966 lieutenant test. (R. 91 Tab K, *U.S. v. City*, 573 F.2d 416, 419, n. 2) (A-83 to 84, stip. facts 14-17) (R. 136-1, Pl. Ex. 11, pp. 3-5, excluded from evidence)

The City made the first race-based promotions, on March 11, 1978, from the 1970 lieutenants' list and 1973 captains' list. (R. 136-1, Pl. Ex. 20, resp. #2) Judge Frank McGarr later found those lists were non-discriminatory. On October 17, 1979, Judge McGarr entered final summary judgment against the United States, on remand from *U.S. v. City of Chicago*, 573 F.2d 416 (1978), finding no intentional discrimination and no adverse impact on promotion tests from 1964 to 1973. (R. 91 Tab O)

In 1980, the City entered into a settlement order for racial quotas for future promotions. (R. 91, Tab Q)

On the 1979 lieutenants' list, the city promoted 61 blacks and 9 Hispanics out of order, causing severe adverse impact on whites. Before the quota promotions, there was no adverse impact on Hispanics in pass rates. (R. 162-2, Def. Ex. 37) (R. 136-2, Pl. Exs. 44) (R. 136-2, Pl. Exs. 43 excluded from evidence)

On the 1979 captains' list, the city promoted all the blacks and Hispanics on the list, including two blacks *who did not pass* the test. The NRO promotions caused the selection rate of whites to be about 50% of the selection rates of blacks and Hispanics. (R. 162-2, Def. Ex. 47) (R. 136-2, Pl. Ex. 21-23, pp. 3-4) (R. 141, T. 141-154, 158-161)

B. Incidences of uncongeniality

None of the City's black and Hispanic witnesses testified they were discriminated against in hiring or promotion, as the Seventh Circuit acknowledged (App. 9-10). Most of them rose up through the ranks, and many of the witnesses were appointed to exempt positions, including Commissioner, Deputy Commissioner, Deputy Chief, Affirmative Action officer, etc. (R. 136-2, Def. Ex. 37, pp. 20-38) (R. 149, T. 366)

The City's black and Hispanic witnesses had elite assignments, including special squads, the training academy, and the fire prevention bureau. (R. 150, T. 461, 464-65, 469-72, T. 473 Lewis) (R. 150, T. 511-513, 514 Del la Cerna) (R. 136-2, Def. Ex. 37, pp. 20-38). Two served as "Fireman Friendly", visiting schools. (R. 152, 910-911 Thompson) (R. 152, T. 957 Grand Pre).

No witness even mentioned retaliation and punishment, contrary to a clearly erroneous finding by the district court (App. 24).

No Hispanic witnesses had complaints.

Three black witnesses had complaints of racial slurs from CFD officials.

Around 1957, Elwain Parks, who is black, heard an officer use the "n" word. (R. 150, T. 600) In 1968, Francesco Del la Cerna, who is black, heard a captain use the "n" word. (T. 525-26)

Sometime in the 1970's, Commissioner Quinn remarked to James Winbush, who is black, not Hispanic, that Mexicans were too short to fight fires. He used the term "niggers" in the same private conversation. (R. 149, T. 374)

There was no evidence of uncongeniality by officials in the 1980's. In the 1980's, most of the City's black and Hispanic witnesses were high ranked officers, running the fire department.

Whites as well as blacks have been disqualified from hire for medical reasons, denied transfers, not allowed to act up, and given old equipment, contrary to clearly erroneous findings by the district court implying that these things only happened to blacks. (R. 149, T. 240-242, R. 153, T. 939-40) (R. 153, T. 1044-45, 1048, 1054) (R. 153, 935, 1045, 1049, 1055, 1064) (R. 153, T. 954, 1050, 1057) (App. 23-25).

REASONS FOR GRANTING THE WRIT

I

Isolated incidents of uncongeniality, remote in time, and unrelated to the decision-making process, were not a compelling governmental interest for promotion quotas decades later.

The central issue in a reverse discrimination case, as set out in *Richmond v. Croson*, 468 U.S. 469, 109 S.Ct. 706 (1989), is whether a city had a strong basis in evidence of past discrimination to justify race-based actions, examined under strict judicial scrutiny. The race-based actions must be a narrowly tailored remedy for the past discrimination. The city must explore race-neutral alternatives.

Evidence of discrimination that is remote in time will not support a compelling governmental interest for racial quotas. In *Brunet v. City of Columbus*, 1 F.3d 390 at 409 (6th Cir. 1993), the Court held that evidence profferred in 1989 that a city fire department had discriminated prior to 1975 was too remote in time to justify preferences, especially in light of the city's subsequent steps to improve its recruitment efforts.

Anecdotal evidence, which may prove individual claims of discrimination, will rarely, if ever, show a systemic pattern of discrimination, *Middleton v. City of Flint, Michigan*, 92 F.3d 396 (6th Cir. 1996).

Racial remarks unrelated to the decisional process are insufficient to demonstrate that the employer relied on illegitimate criteria, even when such statements were uttered by a decision maker. *Hong v. Children's Memorial Hospital*, 993 F.2d 1257, 1266 (7th Cir. 1993).

In the present case, the Seventh Circuit found that the promotion quotas in 1991-92 were a narrowly tailored remedy for uncongeniality that had dissipated at least ten years before. The Seventh Circuit found, without reference to any facts, that uncongeniality in the CFD had continued until sometime during the 1980's, however the City's minority witnesses were bosses by that time. They *were* "the people running the fire department" in the 1980's (App. 9-10).

There was no evidence of any connection between the low number of blacks in the department and the isolated incidents of uncongeniality long ago. There was no evidence of anyone not applying or quitting, or failing to be promoted, because of uncongeniality.

II.

The lawful remedy for isolated incidents of uncongeniality was not to pass over innocent, third-party, white males for promotion decades after the incidents; the narrowly tailored remedy would at most involve penalizing the discriminator and providing appropriate relief to the victim, and to explore race-neutral alternatives to increase minority representation.

The lawful remedy for isolated racial remarks was not to pass over innocent, third-party, white males for promotion decades later.

This Court held that individual instances of discrimination do not justify broad remedial relief. Without a pattern of discriminatory acts, if such individual instances occur, a city would at most be justified in penalizing the discriminator and providing appropriate relief to the victim, *Croson*, 109 S.Ct. at 729.

The appearance of a low percentage of minorities in the captain rank was obviously the result of quotas in the lower ranks and not the result of discrimination in hiring or promotion.

The City did not explore race-neutral alternatives to increase minority representation in the captain rank to reflect the growing number of minorities in the lower ranks, that dramatically increased since the 1970's due to hiring quotas and quotas in the lower rank of lieutenant. As a race-neutral alternative, the City could have given promotion tests more often, or developed an early retirement program.

III.

Hispanics should not have been randomly included in promotion quotas.

This Court held that Spanish and other ethnic groups should not be randomly included in race-conscious actions, *Richmond v. Croson*, 468 U.S. 469, 109 S.Ct. 706, 728 (1989).

The Seventh Circuit randomly included "Hispanics" in its finding about lack of congeniality by people running the fire department (slip. op. 8), with no basis in evidence.

The only two Hispanics who testified, former CFD Commissioner Raymond Orozco and Deputy Commissioner Peter Soto, had no complaints about the job whatsoever. Both were hired when they applied, rose to the rank of battalion chief, and were appointed to exempt

positions. Orozco rose to the very top. (R. 149, T. 204) (R. 136-3, Soto Dep. 5, 79) (Pl. Trial Ex. 37, p. 22)

Francesco Del la Cerna, who was African-American and Filipino, not Hispanic, testified that a comment against Hispanics was made to him when he was applying in 1955. However he testified the speaker was *not* any official in the fire department, contrary to a clearly erroneous fact finding by the district court. (R. 150, T. 494-497, 547-548) (App. 26).

Del la Cerna was hired when he applied, rose to the rank of battalion chief and to the exempt position of Deputy Fire Commissioner. (Pl. brief, p. 36) (Pl. Trial Ex. 37, p. 21)

IV.

The inquiry into whether there is a strong basis in evidence to justify racial quotas, is a question of law, not fact, subject to plenary review.

The central issue in a reverse discrimination case, as set out in *Croson*, is whether the municipality had a strong basis in evidence of past discrimination to justify race-based actions, examined under strict judicial scrutiny.

The third circuit has held this inquiry is a question of law, not fact, and therefore subject to plenary review:

> " 'whether a strong basis in evidence of past or present discrimination exists, thereby establishing a compelling state interest for the municipality to enact a race conscious ordinance is a question of law' subject to plenary review."

Contractors Ass'n of Eastern Pennsylvania v. City of Philadelphia, 91 F.3d 586, 596 (3d Cir. 1996)

In the present case, the Seventh Circuit did not exercise plenary review, and appeared to defer to the district court, as indicated in the following key finding:

> " . . . no minority witness testified that he had applied and been turned down for an entry-level position and that the minority witnesses who had been hired and did testify had been promoted, in some cases to the very top. This was certainly evidence for the district court to consider. But there is enough contrary evidence to justify the judge's conclusion that until sometime during the 1980's the people running the fire department endeavored with considerable success to make the department uncongenial to blacks and Hispanics. This conclusion in turn justified an inference that the underrepresentation of blacks and Hispanics, in various ranks, including captain, was due, at least in part, to discrimination by the City (App. 9-10).

V.

All nine petitioners would have been promoted if promotions had been made in rank order, according to the law of mathematics.

The Seventh Circuit incorrectly affirmed the district court's finding that six of the nine petitioners would not have been promoted if promotions were made in rank order. This finding defies the law of mathematics and was clearly erroneous.

It is undisputed that the City made a total of 161 promotions, and there were five waivers in the top 166. If

promotions had been made in strict rank order, all candidates ranked up to and including rank 166, would have been promoted, since 161 plus 5 waivers equals 166. Those rank order promotions would include the six plaintiffs dismissed on standing grounds, who ranked as follows:

McNamara	#152
Sullivan	#153
Miller	#154
Lux	#157
King	#159
Dineen	#166

(R. 162-1 Joint ex. 9)

None of the above six plaintiffs, who were passed over by NRO promotions, were ever promoted, contrary to confusing language in the district court's opinion (App. 17).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KIMBERLY A. SUTHERLAND
180 W. Washington St.
Suite 700
Chicago, Illinois 60602
(312) 726-0045

Counsel for Petitioners
Counsel of Record

APPENDIX

James A. McNAMARA, et al.,
Plaintiffs-Appellants,

v.

CITY OF CHICAGO, et al.,
Defendants-Appellees.

Nos. 97-1783, 97-1784.

United States Court of Appeals,
Seventh Circuit.

Argued Jan. 15, 1998.

Decided March 18, 1998.

Rehearing and Suggestion for
Rehearing En Banc Denied April 21, 1998.

Kimberly A. Sutherland (argued), Chicago, IL, for Plaintiffs-Appellants.

Sarah Vanderwicken, Despres, Schwartz & Geoghegan, Chicago, IL, J. Paula Roderick, Neal & Associates, Chicago, IL, Lawrence Rosenthal (argued), Jay M. Kertez, Office of the Corporation Counsel, Appeals Division, Chicago, IL, for Defendants-Appellees.

Before POSNER, Chief Judge, and COFFEY and RIPPLE, Circuit Judges.

POSNER, Chief Judge.

Nine white officers of the Chicago Fire Department brought this suit in 1993 against the City and City officials, charging racial discrimination in promotions. After a bench trial, the district judge gave judgment for the defendants and dismissed the suit. All of the plaintiff officers were lieutenants in 1987 and took the exam given

that year for promotion to captain. Three of them had done well on the exam only to be passed over in favor of black and Hispanic lieutenants who received lower scores. These three white officers were, however, promoted to captain a year later. The other six plaintiffs did not do as well on the exam and were denied promotion outright, rather than merely being delayed for a year.

We had a pair of similar cases several years ago (though with different plaintiffs), involving a challenge to affirmative action in promotions in the Chicago Fire Department, including promotions to captain. *Billish v. City of Chicago*, 989 F.2d 890 (7th Cir.1993) (en banc). Those cases had been decided – prematurely, we ruled – on summary judgment; now we have a decision to review that was based on a full trial. But before getting to the merits, we address two jurisdictional issues.

The first, which actually is frivolous though urged by the appellants as their first ground of appeal, is whether the district judge had jurisdiction, after the appeal was filed, to replace "Chicago Police Department" with "Chicago Fire Department" in one sentence of the opinion. As this was the correction of a clerical error, it could be made by the district judge "at any time," Fed.R.Civ.P. 60(a), even after jurisdiction over the case shifted to this court by virtue of the filing of the notice of appeal. *Local 1545 v. Inland Steel Coal Co.*, 876 F.2d 1288, 1292 n. 4 (7th Cir.1989); *Stein v. Wood*, 127 F.3d 1187, 1189 (9th Cir.1997). Even if this were wrong, and the error could not be corrected while the case was on appeal, the existence of a trivial error, obviously merely typographical, in the district court's opinion would not be a ground for reversing the judgment.

The second jurisdictional issue is substantial, but also not dispositive of the appeal. It concerns the standing of the six plaintiffs who were denied promotion outright. They ranked between 152 and 166 in the scoring of the 1987 exam for captains. Had the City promoted in strict rank order, without any favoritism for members of minority groups, it would have promoted 143 of the examinees and reached number 146 (because three of the top 146 scorers waived promotion); no one ranking below 146 on the exam would have been promoted. It is true that the actual number of promotions made was not 143, but 161, and that the last promotion would have been 166 (because there were two more waivers) had promotions been made in strict rank order. But the additional 18 promotions (161 – 143) were made pursuant to the same affirmative action plan that was responsible for the favored treatment of which the plaintiffs are complaining. Had there been no favoritism, the six low-ranking plaintiffs would not have been promoted, because promotions would have stopped at 146 and the highest-ranking of these plaintiffs was as we said number 152.

A plaintiff who would have been no better off had the defendant refrained from the unlawful acts of which the plaintiff is complaining does not have standing under Article III of the Constitution to challenge those acts in a suit in federal court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41, 96 S.Ct. 1917, 1925-26, 48 L.Ed.2d 450 (1976); *Harp Advertising Illinois, Inc. v. Village of Chicago Ridge*, 9 F.3d 1290 (7th Cir.1993). That appears to be (but, as we are about to see, may not be) the situation of these six

plaintiffs. The remaining plaintiffs clearly were hurt by the affirmative action plan, because they ranked in the top 146 but were passed over to make room for minority lieutenants. The harm was temporary, because they were promoted to captain a year later, and therefore limited; but obviously not so limited as to deprive them of standing.

But just as a person may recover damages for emotional distress caused by his having been denied due process of law, even though if he had received due process he would still have lost the case in which the procedural violation occurred, *Carey v. Piphus*, 435 U.S. 247, 263-64, 98 S.Ct. 1042, 1052-53, 55 L.Ed.2d 252 (1978), so it can be argued that a person denied a benefit on an invidious ground may obtain damages for emotional distress caused by that denial even if he would have been denied the benefit anyway. And *Price v. City of Charlotte*, 93 F.3d 1241, 1245-48 (4th Cir.1996), so holds. Neither the Supreme Court nor this court has had occasion to examine the question. The objection to the answer given by *Price* is that it enormously multiplies the number of potential plaintiffs in equal protection cases; persons who had not been harmed in the usual sense could nonetheless sue for damages resulting from the insult implicit in any denial to a person of the equal protection of the laws. But this is not the case in which to try to wrestle the issue to the ground. Since three of the plaintiffs have standing, the merits issue cannot be avoided, and in these circumstances we may elide the jurisdictional issue. *Steel Co. v. Citizens for a Better Environment*, ___ U.S. ___, ___, 118 S.Ct. 1003, 1013, ___ L.Ed.2d ___ (1998). And we may do so for the additional reason that, given the claim of

damages for emotional distress, the jurisdictional issue is not whether the plaintiffs have been harmed (Article III) but whether they should be allowed to sue for that harm (zone of interests). The latter type of jurisdictional issue ("prudential standing" as it is sometimes called) may be bypassed in favor of deciding the merits when the outcome is unaffected and the merits issue easier than the jurisdictional issue. *Id.*

So let us turn to the merits. The parties agree that minority lieutenants received favorable treatment on account of their race (in the case of the blacks) and their ethnicity (in the case of the Hispanics) and that such treatment is a denial of equal protection unless it can be justified under the demanding standard that goes by the name "strict scrutiny." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 236-37, 115 S.Ct. 2097, 2117-18, 132 L.Ed.2d 158 (1995). They further agree, as they also must under the cases, that one justification that passes muster under this demanding standard is that the favored treatment is necessary to remedy unlawful discrimination in the past by the entity conferring the favor. E.g., *People Who Care v. Rockford Board of Education*, 111 F.3d 528, 535 (7th Cir.1997). Whether other justifications are possible is unsettled, *United States v. Paradise*, 480 U.S. 149, 167 n. 18, 107 S.Ct. 1053, 1064 n. 18, 94 L.Ed.2d 203 (1987); compare *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 109 S.Ct. 706, 721-22, 102 L.Ed.2d 854 (1989) (plurality opinion); *Taxman v. Board of Education*, 91 F.3d 1547, 1557 (3d Cir.1996); and *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir.1996), with *Regents of the University of California v. Bakke*, 438 U.S. 265, 311-14, 98 S.Ct. 2733, 2759-61, 57 L.Ed.2d 750 (1978) (opinion of Justice Powell), but this

court has held that at least in the area of policing and corrections it is possible to justify nonremedial affirmative action upon a showing – which must however be based on evidence rather than merely on conjecture – that such action is necessary to the accomplishment of important law-enforcement objectives. *Wittmer v. Peters*, 87 F.3d 916 (7th Cir.1996).

At argument there was some discussion of whether a similar justification might be available in the case of firefighters, who may lack credibility, and be denied cooperation, in minority neighborhoods if the firehouses in those neighborhoods have only white personnel. Cf. *Alexander v. Estepp*, 95 F.3d 312, 316 (4th Cir.1996); *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207, 213 (4th Cir.1993). But as the City presented very little evidence of this at trial, it is not available to support the judgment on appeal. Racial discrimination cannot survive challenge without compelling evidence; even highly plausible speculation will not do. *Id.* at 214; *Wittmer v. Peters*, *supra*, 87 F.3d at 918-19.

So the only available justification is the remedial one, and it requires proof both that the City engaged in racial and ethnic discrimination in the employment of firefighters in the past and that the remedy is narrowly tailored to the violation, which means, as a practical matter, that it discriminates against whites as little as possible consistent with effective remediation. *Shaw v. Hunt*, 517 U.S. 899, 907-11, 116 S.Ct. 1894, 1902-03, 135 L.Ed.2d 207 (1996); *Billish v. City of Chicago*, *supra*, 989 F.2d at 893; *Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 91 F.3d 586, 596 (3d Cir.1996); *Podberesky v. Kirwan*, 38 F.3d 147, 153 (4th Cir.1994). To assess the

validity of the remedy in this case requires us to review the evidence on both these fronts (past violation and tailored remedy), giving proper weight to the district judge's findings of fact – a precept the plaintiffs ignore.

Until comparatively recently the City employed very few minority firefighters relative to their proportion of the city's population. As late as 1974, only 4 percent of the firefighting force was black and only one-half of 1 percent was Hispanic (figures essentially unchanged from 1950, the earliest year for which there are statistics in the record), even though blacks and Hispanics accounted for a much higher percentage of the city's population. (Blacks alone were almost a third of the city's population in 1970.) Raw statistical disparities prove little; they certainly do not prove *intentional* discrimination. A glance at almost any occupation in the United States will reveal disparities, often stark, between the racial, ethnic, religious, and sexual composition of the occupation and that of the American population in general, and not all of these disparities are plausibly attributable to intentional, or for that matter unintentional, discrimination, let alone intentional discrimination by the particular employer that has been sued. Racial, ethnic, religious, and sexual identity are correlated with attitudes, accomplishments, tastes, experiences, aspirations, opportunities, educational background, and other aspects of personality and personal history that bear on eligibility and suitability for, and the choice of, a particular occupation. Some of the differences may of course be due to discrimination, but the only discrimination for which an employer is liable is the discrimination that *he* engages in.

The statistician who testified for the City tried to correct for some of the nonculpable factors that bear on occupational choice by comparing the racial and ethnic composition of people who applied for jobs with the Chicago Fire Department with the racial and ethnic composition of the city's population in the relevant age group, viewed as a control group. It turned out that at least in the case of blacks the composition of the applicant group was similar to that of the control group, indicating that in the early 1970s blacks were being *hired* at a lower rate than white applicants, since they were *applying* at a similar rate yet were underrepresented in the fire department. Even this, of course, was not decisive, for the whites might simply have had better aptitudes. Whites on average have more years of schooling than blacks, and this is important in many jobs – but not, so far as the record shows, in a firefighter's job, where no college is required and the entry-level firefighter's job does not, at least according to this record, require special skills, see also *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1554 (11th Cir.1994), let alone skills correlated with membership in particular racial or ethnic groups. We note, however, that the statistician's evidence does not suggest discrimination in the hiring of Hispanics, who until the middle 1980s applied for firefighters' jobs at a substantially lower rate than their percentage of the relevant age group.

In 1974, the City settled a discrimination suit by the federal government by agreeing to hire a much higher percentage of blacks and Hispanics. But immediately the City instituted a hiring freeze as a result of which no firefighters of any race were hired for three years. When

the freeze ended, the percentage of black and Hispanic firefighters was no higher than it had been in 1950, even though the black and Hispanic percentage of the population of Chicago had doubled.

In 1979, upon motion by the Department of Justice to enforce the consent decree, the district court issued a further order requiring preferential hiring of blacks and Hispanics. The Department also questioned the exam that the City had administered in 1978 for promotion to lieutenant and captain; the exam contained a large subjective component and had not been shown to test for the knowledge and skills actually required in a fire lieutenant or captain. Again the City settled. The City redid the exam; and it was the redone and presumably race-neutral exam that was administered to would-be captains in 1987. Because so few blacks and Hispanics had been hired in the 1960s and 1970s, and because it takes many years for a firefighter to work his way up to lieutenant – and only lieutenants are eligible for promotion to captain – in 1986 only 2.6 percent of the captains were black and only 1 percent were Hispanic, even though by this time a majority of the City's population was black or Hispanic.

There was also direct evidence of racial discrimination in the Chicago Fire Department up to and into the 1980s, much of it concerning the racial policies of senior officials of the department, including one Fire Commissioner. The plaintiffs point out that no minority witness testified that he had applied and been turned down for an entry-level position and that the minority witnesses who had been hired and did testify had been promoted, in some cases to the very top. This was certainly evidence for the district judge to consider. But there was enough

contrary evidence to justify the judge's conclusion that until sometime during the 1980s the people running the fire department endeavored with considerable success to make the department uncongenial to blacks and Hispanics. This conclusion in turn justified an inference that the underrepresentation of blacks and Hispanics in the various ranks, including that of captain, was due, at least in part, to discrimination by the City.

The groundwork thus was laid for justifying on remedial grounds the application of a plan for affirmative action to the results of the 1987 captains' examination. The exam itself is conceded to have been fair, and had promotions been made in strict order of rank on the exam 20 of the 143 lieutenants promoted would have been black (14 percent) and 5 would have been Hispanic (3.5 percent, though the figure in the record is a mysterious 4.7 percent). The affirmative action plan called for increasing the fraction of minority lieutenants promoted to captain to 20 percent black and 5 percent Hispanic, but for doing so with minimum adverse impact on whites. To this end, the City made the 18 additional promotions, for a total of 161, of which 31 were of black lieutenants and 9 were of Hispanic lieutenants. Because there were so few black and Hispanic captains before the new promotions, these promotions, though slanted in favor of the minority lieutenants, did not bring the racial and ethnic composition of the fire captains into conformity with the racial and ethnic composition of either the city population (corrected for age) or the fire department as a whole. In 1992, immediately after the completion of the promotions, the percentage of black captains was 10.8 percent and the percentage of Hispanic captains 3.6 percent. Had it not

been for the affirmative action plan, these percentages would have been 5.7 percent and 1.7 percent in a city the population (age adjusted for comparability) of which is, as we said, more than half black or Hispanic.

The increase in the number (as distinct from percentage) of black captains over what it would have been without the affirmative action plan was 11 and of Hispanic captains 4, and it could be argued that the City must demonstrate a compelling interest in such an increase. But that would be the wrong approach in a case in which the justification for affirmative action is remedial. The test is, rather, whether the increase is a plausible lower-bound estimate of a shortfall in minority representation among fire captains that is due to the fire department's intentional discrimination in the past. See *Aiken v. City of Memphis*, 37 F.3d 1155, 1165 (6th Cir.1994) (en banc); *Peightal v. Metropolitan Dade County*, supra, 26 F.3d at 1558; cf. *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 434-37, 96 S.Ct. 2697, 2703-05, 49 L.Ed.2d 599 (1976); *People Who Care v. Rockford Board of Education, supra*, 111 F.3d at 534. And we think it is. The result of the affirmative action plan was to boost the minority proportion of captains to 14.4 percent, which was still far below the minority proportion of the city's population and of the lowest rank in the fire department (29 percent minority). The percentage in the lowest rank may be inflated to some extent by affirmative action. But considering the history of discrimination by the City and the minimal educational requirements for being a firefighter, we think it a reasonable surmise (and no more is practicable, given the nature of the inquiry) that, had it not been for the City's discrimination against blacks and Hispanics in the

past, the percentage of black and Hispanic captains would be at least a third of the potential applicant pool; and that is all it is, even with the affirmative action challenged here.

It remains to consider the plaintiffs' contention that the doctrine of judicial estoppel barred the City from trying to prove that it had engaged in intentional discrimination in the past, since in earlier litigation it had, unsurprisingly, denied that charge. The doctrine provides that a party who prevails on one ground in a lawsuit cannot turn around and in another lawsuit repudiate the ground. *Davis v. Wakelee*, 156 U.S. 680, 689-91, 15 S.Ct. 555, 558-59, 39 L.Ed. 578 (1895); *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1427-28 (7th Cir.1993); *Astor Chauffeured Limousine Co. v. Runnfeldt Investment Corp.*, 910 F.2d 1540, 1547 (7th Cir.1990); *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 358 (3d Cir.1996); *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 212-13 (1st Cir.1987). If repudiation were permitted, the incentive to commit perjury and engage in other litigation fraud would be greater. *Chaveriat v. Williams Pipe Line Co., supra*, 11 F.3d at 1428. A party envisaging a succession of suits in which a change in position would be advantageous would have an incentive to falsify the evidence in one of the cases, since it would be difficult otherwise to maintain inconsistent positions. The doctrine of judicial estoppel requires, however, that the party sought to be estopped have obtained a favorable judgment or settlement (*Kale v. Obuchowski*, 985 F.2d 360, 361-62 (7th Cir.1993)) on the basis of a legal or factual contention that he wants to repudiate in the current litigation. Otherwise

it would be inconsistent with the rule that permits inconsistent pleadings. *Astor Chauffeured Limousine Co. v. Runnfeldt Investment Corp., supra,* 910 F.2d at 1548. The City did convince a district judge, in the first suit brought by the Department of Justice, that it had not discriminated against blacks and Hispanics during part of the period covered by the present litigation. But it abandoned that position on appeal and so never obtained either a favorable judgment or a favorable settlement on the basis of it. The doctrine of judicial estoppel is inapplicable.

The plaintiffs make other arguments, based mainly on evidentiary rulings by the district judge; but these do not have sufficient merit to warrant discussion.

AFFIRMED.

James A. McNAMARA, John J. Sullivan, Thomas R. Miller, Charles W. Lux, William T. King, Charles E. Dineen, Richard A. Graf, Henry T. Scavone and Paul B. Sobczak, Plaintiffs,

v.

CITY OF CHICAGO, a municipal corporation, Defendant.

No. 93 C 1098.

United States District Court,
N.D. Illinois,
Eastern Division.

March 18, 1997.

Kimberly Sutherland, Chicago, IL, for Plaintiffs.

Susan S. Sher, Corporation Counsel, Shona Glink, Asst. Corporation Counsel, Jay Kertez, Asst. Corporation Counsel, City of Chicago, Chicago, IL, for Defendant.

DECISION ON THE MERITS

CONLON, District Judge.

The hiring and promotional practices of the Chicago Fire Department have spawned more than two decades of civil rights litigation. In this case, nine white captains and lieutenants challenge the affirmative action promotion of sixteen black and nine Hispanic lieutenants to the position of captain. The plaintiffs claim their equal protection rights under the United States Constitution were violated by the challenged promotions.

A six-day bench trial was held. After considering the testimony, exhibits and arguments of counsel, the court

enters the following findings of fact and conclusions of law, as required by Rule 52(a) of the Federal Rules of Civil Procedure.

As a preliminary matter, the court adopts and incorporates the parties' stipulation of uncontested facts, as well as the now uncontested portions of the city's statement of contested facts in the joint final pretrial order.

THE 1987 CAPTAIN'S EXAMINATION

The following background facts are undisputed. The City of Chicago's Department of Personnel develops and administers promotional examinations for the Chicago Fire Department. Plaintiffs challenge the out of rank order promotions of twenty-five blacks and Hispanics on May 1, 1991 and April 1, 1992 from the results of fire captain examination # 68737. Plaintiffs are white males who passed the fire captain examination.

Only lieutenants in the Chicago Fire Department were eligible to take the captain's examination. The examination consisted of three parts: a written multiple choice test, an oral board interview and credit for seniority. The city's Department of Personnel used job content as a source of knowledge and skill to be tested. To define job content for the 1987 captain's examination, the Department of Personnel conducted a job analysis. The process used is detailed in "The Report on the Validation of the Fire Captain Examination of 1986." It is undisputed that the job analysis procedures used by the city in the construction of the 1987 captain's examination were professionally recognized and complied with the Equal

Employment Opportunity Commission Guidelines on Employee Selection Procedures.

After the job analysis was conducted, the tasks, knowledge, skills and abilities identified, and the source materials examined, a joint committee from the Chicago Fire Department and the Department of Personnel prepared the test.

Training sessions were conducted at city colleges prior to the administration of the examination. The Chicago Fire Department provided each applicant with source materials to study. These materials included fire department rules and regulations, citations to general orders, operating procedures, and bulletins.

The oral component of the examination was designed to measure and evaluate knowledge, skills and abilities that are important to the position of fire captain. The oral examination questions were also developed by a joint committee of Chicago Fire Department and Department of Personnel staff. The nine oral board raters who graded the oral examinations were commanders in the Chicago Fire Department; each candidate was evaluated by two of these commanders.

A total of 577 lieutenants applied to take the 1987 captain's examination: 496 were white (86%), sixty-three (10.9%) were black, and eighteen (3.1%) were Hispanic. A total of 543 lieutenants actually took the written component of the examination: 463 (85.3%) were white, sixty-three (11.6%) were black, and seventeen (3.1%) were Hispanic. Only 506 lieutenants then proceeded to take the oral component of the examination: 431 (85.2%) were

white, fifty-eight (11.5%) were black, and seventeen (3.4%) were Hispanic.

The results of the 1987 captain's examination were weighted 65% on the written component, 25% on the oral component and 10% on seniority. The passing score was 70; 341 of the candidates passed the examination.

A promotional eligibility list of the 341 lieutenants who passed the examination ranked the candidates in the order of their test results. Between October 16, 1987 and April 1, 1992, 161 lieutenants from the promotional eligibility list were promoted to captain: 121 were white, thirty-one were black, and nine were Hispanic. Of these 161 promotions, twenty-five were made on a non-rank order basis. Of the twenty-five non-rank promotions, sixteen were to black lieutenants and nine were to Hispanic lieutenants. Eligible candidates ranked 106, 115, 132, 162 and 165 waived promotion or were withdrawn for reasons unrelated to this case. It is undisputed that if promotions from the 1987 eligibility list had been made in strict rank order, all candidates ranked up to and including rank 146 would have been promoted.

Plaintiffs declined to stipulate that twelve promotions were made in 1992 to comply with the city's "wrap-around" agreement with the United States Department of Justice pursuant to a settlement agreement in another civil rights case. This group also included three additional minority out of rank promotions. However, the undisputed evidence established that promotions were given to all non-minority lieutenants who were passed over because of out of rank order affirmative action promotions. *See, e.g.*, Def.Ex. 8, 9. Plaintiffs ranked as follows

on the promotional eligibility list: James A. McNamara 152; John J. Sullivan 153; Thomas R. Miller 154; Charles W. Lux 157; William T. King 159; Charles E. Dineen 166; Richard A. Graf 136; Henry A. Scavone 138; and Paul B. Sobczak 139. Plaintiffs Graf, Scavone and Sobczak were each promoted to the rank of captain before the list expired, pursuant to the "wrap-around" agreement. The remaining plaintiffs were not promoted from the eligibility list, which expired shortly after April 1, 1992. *Id.*

STANDING

The city belatedly challenges the standing of plaintiffs McNamara, Sullivan, Miller, Lux, King and Dineen, all of whom ranked lower than 146 on the promotional eligibility list.[1] Because these plaintiffs would not have been promoted even if strict rank order had been followed, the city argues that they have failed to show any injury from the non-rank affirmative action promotions.

It is plaintiffs' burden to establish all elements of their claim under 42 U.S.C. § 1983 by a preponderance of the evidence. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277-78, 106 S.Ct. 1842, 1848-49, 90 L.Ed.2d 260 (1986). This includes the necessity of showing that plaintiffs have actually suffered a particularized and specific injury as a result of the city's conduct. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351

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[1] It is unfortunate that the city did not raise this issue in a motion for summary judgment, as it would have narrowed the issues for trial and obviated the affected plaintiffs' inconvenience and burden in participating in this trial.

(1992). Plaintiffs have not done so. Rather, they respond that simply because there were a total of 161 promotions from the eligibility list and they ranked numerically higher than 161, they should have been promoted. However, plaintiffs ignore the undisputed fact that if strict rank order had been followed, no candidate ranked lower than 146 would have been promoted. In fact, all non-minority candidates passed over due to out of rank affirmative action appointments were in fact promoted under the "wrap-around" agreement (including the three remaining plaintiffs: Graf, Scavone and Sobczak). Accordingly, plaintiffs McNamara, Sullivan, Miller, Lux, King and Dineen were not denied promotions because of the out of rank affirmative action promotions, and lack standing in this case. Thus, the only question here is whether the delay in promoting Graf, Scavone and Sobczak constitutes a violation of the Equal Protection Clause.

CONSTITUTIONALITY OF AFFIRMATIVE ACTION

It is a fundamental principle that the Equal Protection Clause of the United States Constitution prohibits municipalities from discriminating on the basis of race or ethnicity. Plaintiffs contend that the twenty-five out of rank affirmative action promotions discriminated against them based upon the fact that plaintiffs are white.

To pass constitutional muster, race-based affirmative action must be strictly scrutinized to determine whether it serves a compelling governmental interest and whether it is narrowly tailored to further that governmental interest. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, ___-___, 115 S.Ct. 2097, 2116-17, 132 L.Ed.2d 158 (1995).

Racial and ethnic distinctions are inherently suspect and therefore require the most exacting judicial examination. *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 291, 98 S.Ct. 2733, 2748-49, 57 L.Ed.2d 750 (1978). However, municipalities are not constitutionally barred from taking race-based affirmative action when it is necessary to remedy the lingering effects of discrimination against minority groups. *Adarand*, 515 U.S. at ___, 115 S.Ct. at 2117. As Justice O'Connor wrote in *Adarand*,

> Finally, we wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." *Fullilove [v. Klutznick], supra*, [448 U.S. 448] at 519, 100 S.Ct., [2758] at 2795 [65 L.Ed.2d 902 (1980)] (Marshall, J., concurring in judgment). The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. As recently as 1987, for example, every Justice of this Court agreed that the Alabama Department of Public Safety's "pervasive, systematic, and obstinate discriminatory conduct" justified a narrowly tailored race-based remedy. *See United States v. Paradise*, 480 U.S., [149] at 167, 107 S.Ct., [1053] at 1064 [94 L.Ed.2d 203 (1987)] (plurality opinion of BRENNAN, J.) *id.*, at 190, 107 S.Ct., at 1076 (STEVENS, J., concurring in judgment); *id.*, at 196, 107 S.Ct., at 1079-1080 (O'CONNOR, J., dissenting). When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases.

Id.

COMPELLING GOVERNMENTAL INTEREST

A compelling governmental interest justifying affirmative action may be shown by the use of statistical evidence establishing discrimination plus a history of entry-level and promotional discrimination. *Erwin v. Daley*, 92 F.3d 521, 527 (7th Cir.1996) *cert. denied*, ___ U.S. ___, 117 S.Ct. 958, 136 L.Ed.2d 845 (1997). *Stuart v. Roache*, 951 F.2d 446, 448-49, 455 (1st Cir.1991); *Vogel v. City of Cincinnati*, 959 F.2d 594, 596-97, 601 (6th Cir.1992) (statistical evidence alone sufficient to show compelling governmental interest). The statistical and historic evidence presented by the city establishes that the Chicago Fire Department has openly and intentionally discriminated against blacks and Hispanics until at least 1979; decades of discrimination have caused a significant lingering overrepresentation of whites and a significant underrepresentation of blacks and Hispanics, particularly in the upper ranks, when the promotions were made from the 1987 captain's examination.

The Department of Personnel predicated its decision to make a limited number of out of rank affirmative action promotions on three independent grounds. Def.Ex. 6. First, the city was under a continuing obligation to comply with a 1980 consent decree entered by former Judge McGarr of this Court in a desegregation case brought by the United States Department of Justice. The decree required the city to pursue a goal of promoting blacks and Hispanics to substantially increase minorities at each promotional rank; each rank was to become more representative of the rank from which promotions were made. In July 1987, only 3% of the captains were black or Hispanic, while 13.5% of the lieutenants and 26% of the

firefighters/engineers were black or Hispanic. The city's Corporation Counsel was of the opinion that under these circumstances, adherence to strict rank order promotions would violate Judge McGarr's decree. *Id.* at 1.

Second, under an existing collective bargaining agreement, the city was required to follow promotion policies designed to achieve a level of representation at each rank as close as reasonably possible to 45% black and Hispanic, as quickly as possible. *Id.* at 1-2.

Third, wholly apart from Judge McGarr's decree and the collective bargaining agreement, Commissioner of Personnel Jesse E. Hoskins concluded that the city's commitment to equal opportunity required adoption of reasonable affirmative action measures to remedy the effects of past discrimination. In his letter to Fire Commissioner Louis Galante explaining the city's decision, Commissioner Hoskins observed:

> Although we have been working in recent years to overcome the effects of past discrimination, those effects are still clearly present. Based on 1980 census workforce availability figures, one would expect Blacks and Hispanics to comprise approximately 35% and 10% respectively, of each rank in the promotional sequence. The actual utilization figures demonstrate a sever under-utilization.
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> |---|---|---|
> | Lieutenants | 10.4% | 3.1% |
> | Captains | 2.1% | 1.03% |
> | Battalion Chiefs | 1.01% | 1.01% |
>
> The unfortunate reason for this underutilization is past discrimination by the City. Prior to the

> late 1970's, there was only minimal hiring of Blacks and Hispanics as Firefighters [the entry level position]. The discrimination in hiring has had its predictable effect on minority access to higher level positions . . . This problem was exacerbated by the past use of discriminatory promotion tests, *i.e.*, invalidated tests which had an adverse impact on minorities. These practices led the United States Department of Justice to bring suit against the City, which produced the consent decrees under which we now operate.

Id. at 2. The evidence adduced at trial fully supports Commissioner Hoskin's analysis.

It is undisputed that prior to September 1965, the Chicago Fire Department maintained racially segregated firehouses and companies. The uncontroverted evidence establishes that Commissioner Robert J. Quinn of the Chicago Fire Department ordered limited, token integration of certain firehouses only after widespread rioting on the westside in August 1965. The rioting occurred after the death of Dessie Mae Williams, a twenty-three year old black woman who was reportedly killed due to the negligence of white firefighters from an all-white firehouse located in a predominately black westside neighborhood.

Credible trial testimony established pervasive, intentional discrimination experienced by black applicants and firefighters since at least the 1950's. Many of the witnesses observed that black applicants were frequently disqualified during medical examinations for the stated reason of "flat feet" or "heart murmurs," which blacks viewed as pretextual. Only a few blacks were hired and sent to the fire department's training academy in classes that varied from seventy to over a hundred whites.

According to unchallenged testimony, there were never more than 205 black firefighters (out of several thousand firefighters) at any time prior to 1977. The very small number of black firefighters remained relatively fixed between 1950 and 1977, despite the steady increase in minority population during that period. Def.Ex. 63, ex. 4. The observed disparities between blacks in the Chicago Fire Department and blacks in the qualified and interested work pool greatly exceed two to three standard deviations and thus strongly suggest intentional discrimination. *Associated General Contractors of California, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1414 (9th Cir.1991), *cert. denied*, 503 U.S. 985, 112 S.Ct. 1670, 118 L.Ed.2d 390 (1992); *Waisome v. Port Authority of New York and New Jersey*, 948 F.2d 1370, 1376 (2d Cir.1991).

Entry-level black firefighters were then assigned to all-black companies or trucks usually under the direction of white officers who spent little time in the black firehouses. White firefighters were only assigned to black firehouses as punishment for disciplinary infractions. Black firehouses were situated in high frequency areas for fire calls, and were called upon to fight some of the most deadly fires. Nevertheless, the equipment furnished to black firefighters was generally older than that furnished to white firefighters called to assist at the same fires. Black firefighters who complained about working conditions were subject to retaliation and punishment. This was graphically illustrated by the experiences of the witnesses who attempted to route their complaints through proper channels.

Most of the minority witnesses personally experienced racially demeaning comments and conduct from

white personnel of the fire department, from former Commissioner Robert J. Quinn (1957-1978) to officers and other firefighters. The record reflects persuasive evidence of racial animus and hostility by the leadership, as well as the rank and file of the fire department, during Commissioner Quinn's administration.

Requests for transfer by black firefighters to firehouses closer to their homes were routinely denied. According to the persuasive testimony of former Fire Commissioner Louis Galante (1983-1989) and Deputy Personnel Commissioner Thomas T. Joyce, blacks fared poorly on evaluations because of the use of subjective efficiency ratings; blacks generally scored far below whites when rated for "efficiency" by white officers. This perception of unfairness was also common among black firefighters who testified at trial.

No training or preparatory materials were given applicants for promotional examinations. Before affirmative action orders in several previous civil rights cases, few blacks or Hispanics reached the top ranks of battalion chief and chief. Indeed, according to uncontradicted testimony, a black would not be promoted to these upper ranks unless another black vacated the position. Prior to 1974, there were only seven black battalion chiefs in the entire history of the fire department. Prior to the mid or late 1980's, there were never more than two black battalion chiefs at one time. Affirmative action prior to 1987 had a minimal impact on the observed racial disparities in the rank of captain. Relatively few blacks were promoted from entry-level firefighter to the position of lieutenant until the late 1970's. The length of time it has taken for blacks to be promoted from firefighter to lieutenant

has been significantly longer than that for whites. This was shown by reliable statistical evidence for the period 1973 to 1993 and by the actual experiences of the witnesses, who were consistently denied the opportunity to "act up" to officers' positions when a vacancy occurred. Blacks were thereby denied meaningful experience for advancement.

The presence of Hispanics was rare; there were less than twenty on the job in 1974. Former Fire Commissioner Raymond Orozco (1989-1996), who held the rank of captain in 1974, was the highest ranking Hispanic in the fire department at that time. One of the witnesses with an Hispanic name, Francesco de la Cerna, was told by a fire department officer that the department did not hire Mexicans and Puerto Ricans when he applied in the 1950's. The minimum height restriction prior to 1974, which the parties stipulate was not related to the job, evidences purposeful discrimination when viewed in the context of all the other evidence. *Dothard v. Rawlinson*, 433 U.S. 321, 328-30, 97 S.Ct. 2720, 2726-27, 53 L.Ed.2d 786 (1977).

Compelling and credible evidence establishes systemic discrimination existed in the Chicago Fire Department for decades. Open discriminatory practices pervaded all levels within the fire department until at least the late 1970's. Integration was only permitted to a limited degree under public pressure, such as the 1965 westside riots or to showcase a special unit with high public visibility. In order to evade a 50% minority hiring order effective for four years in a consent decree issued by another judge of this Court, the fire department simply froze hiring from 1974 to 1979. Def.Ex. 86-90. The

evidence showed that the hiring freeze was contrary to the fire department's needs and the public safety. A reasonable inference may be drawn that the management of the fire department under Commissioner Quinn considered the defeat of court-ordered integration far more important than the efficient functioning of a vital public service. As the result of years of discrimination and the 1977-1979 hiring freeze, blacks and Hispanics were substantially underrepresented in the lieutenant pool qualified for promotion to the rank of captain in the late 1980's.

In sum, the evidence supports the city's 1987 decision to utilize limited out of rank promotions to ameliorate the significant underrepresentation of minorities in the rank of captain. Based upon strong evidence of the lingering effects of purposeful discrimination over a long period time, the city had a compelling governmental interest in addressing the problem.

A NARROWLY TAILORED REMEDY

In deciding to employ out of rank promotions for the 1987 captain's test, the city expressly found that there were no other available means to accelerate the progress of significantly underrepresented minorities through the promotional ranks of the Chicago Fire Department. The city used race-neutral means to provide training and study materials for the 1987 captain's examination. The city sought a remedy that would not unduly burden non-minority candidates for promotion or result in the promotion of unqualified minorities. In his letter to Fire Commissioner Galante, the city's Director of Personnel stated:

> In view of the current 97% white composition of the rank of Captain, an argument could be made for the temporary use of a 50% minority promotion ratio. Although we considered selecting a 50% ratio, the lower goals of 20% Black and 5% Hispanic were chosen in order to ensure that our affirmative action efforts do not unduly burden other candidates for promotion. We also considered the qualifications of the individuals who will be promoted as a result of the affirmative action goals. First and foremost, **no one will be promoted as a result of affirmative action unless that person has been shown to be qualified by virtue of achieving a passing score on the [1987 captain's examination]**. . . . [E]xamination of the rank order test scores shows that there will be virtually no difference in test scores between those promoted as a result of affirmative action and those who would have been promoted were we to promote in strict rank order.

Def.Ex. 6 at 4 [emphasis added]. The affirmative action promotions were limited to the three-year life of the promotional eligibility list or until 150 promotions were made from the list. *Id.* The goals of the temporary plan were to be evaluated annually; the plan was designed to remove the effects of past discrimination, not to maintain racial balance after the effects of past discrimination were corrected. *Id.* And because of the "wrap-around" agreement with the Justice Department, all non-minority lieutenants who were by-passed for promotion because of affirmative action promotions were in fact also promoted before the eligibility list expired in 1992. Def.Ex. 9. Thus, the impact on third parties was minimized.

The burden on the three remaining plaintiffs was a delay of one year in their promotions. This delay was unfortunate for plaintiffs. However, the court cannot conclude that this delay was unreasonable or unduly burdensome under all the circumstances. The earlier out of rank promotions of twenty-five fully qualified blacks and Hispanics were not a violation of plaintiffs' constitutional right to the equal protection of the law. *United States v. Paradise*, 480 U.S. 149, 183, 107 S.Ct. 1053, 1072-73, 94 L.Ed.2d 203 (1987).

CONCLUSION

Plaintiffs have failed to provide any evidence that the city has engaged in unlawful race-based discrimination against whites. Overwhelming credible evidence establishes that the Chicago Fire Department engaged in intentional discrimination against minorities over several decades. A limited number of out of rank promotions to fully qualified candidates was a modest remedy for this unlawful conduct.

For the foregoing reasons, judgment is entered for the defendant City of Chicago and against plaintiffs James A. McNamara, John J. Sullivan, Thomas R. Miller, Charles W. Lux, William T. King, Charles E. Dineen, Richard A. Graf, Henry A. Scavone and Paul B. Sobczak.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

April 21, 1998

Before

Hon. Richard A. Posner, Chief Judge

Hon. John L. Coffey, Circuit Judge

Hon. Kenneth F. Ripple, Circuit Judge

JAMES A. MCNAMARA, et al., *Plaintiffs-Appellants,*	) Appeals from the) United States District) Court for the
Nos. 97-1783 & 97-1784	) Northern District of
v.	) Illinois, Eastern
CITY OF CHICAGO, et al.,	) Division.
Defendants-Appellees.	) Nos. 93 C 1098 & 93 C 3028
	) Suzanne B. Conlon &) James F. Holderman,) *Judges.*

ORDER

On April 1, 1998, plaintiffs-appellants filed a petition for rehearing with suggestion for rehearing en banc. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

April 21, 1998
AMENDED: May 13, 1998

Before

Hon. Richard A. Posner, Chief Judge

Hon. John L. Coffey, Circuit Judge

Hon. Kenneth F. Ripple, Circuit Judge

JAMES A. MCNAMARA, et al., *Plaintiffs-Appellants,*	) Appeals from the) United States District) Court for the
Nos. 97-1783 & 97-1784	) Northern District of
v.	) Illinois, Eastern) Division.
CITY OF CHICAGO, et al., *Defendants-Appellees.*	) Nos. 93 C 1098 & 93 C 3028) Suzanne B. Conlon &) James F. Holderman,) *Judges.*

ORDER

On April 1, 1998, plaintiffs-appellants filed a petition for rehearing with suggestion for rehearing en banc. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing en banc.* The petition is therefore DENIED.

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* Hon. Joel M. Flaum did not participate in the consideration of the petition.

(2)

Supreme Court, U.S.
FILED
OCT 5 1998
OFFICE OF THE CLERK

No. 98-128

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

JAMES MCNAMARA, *et al.*,
Petitioners,
v.
CITY OF CHICAGO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

BRIAN L. CROWE
Corporation Counsel of the City of Chicago
LAWRENCE ROSENTHAL *
Deputy Corporation Counsel
BENNA RUTH SOLOMON
Chief Assistant Corporation Counsel
RUTH MASTERS
Assistant Corporation Counsel
City Hall, Room 610
Chicago, Illinois 60602
(312) 744-5337
Attorneys for Respondents

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

35 pp

QUESTIONS PRESENTED

1. Whether the district court's finding that the gross underrepresentation of African-Americans and Hispanics at the rank of fire captain in the Chicago Fire Department was attributable to prior discrimination was clearly erroneous in light of the statistical, historical, and anecdotal evidence presented at trial.

2. Whether an affirmative action plan permitting African-Americans and Hispanics to be promoted out of strict rank order to the position of fire captain was narrowly tailored to redress prior discrimination when the minorities promoted under the plan had promotional examination scores that were statistically indistinguishable from the nonminorities they passed over; the plan guaranteed all nonminorities who were passed over eventual promotion; and it ameliorated some of the underrepresentation of minorities at the rank of fire captain attributable to prior discrimination.

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IN THE

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OCTOBER TERM, 1998

No. 98-128

JAMES MCNAMARA, *et al.*,
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

In their initial complaint, filed on February 22, 1993, six nonminoritity lieutenants in the Chicago Fire Department ("CFD")— petitioners McNamara, Sullivan, Miller, Lux, King, and Dineen—alleged that they had taken and passed the 1987 promotional examination for captain. R. 1 at 2. They further alleged that the City of Chicago had unlawfully passed them over for promotion in favor of minorities in violation of the Equal Protection Clause of the Fourteenth Amendment, and they sought relief under 42 U.S.C. §§ 1981 and 1983. R. 1 at 3. Making similar allegations, petitioners Graf and Scavone were added as plaintiffs on April 6, 1983, R. 8-9, and petitioner Sobczak was added as a plaintiff on April 23, 1993, R. 11.

On March 18, 1997, after a bench trial, the district court held that the CFD's use of a limited number of promotions of African-Americans and Hispanics out of strict rank order was narrowly tailored to address the con-

tinuing effects of the CFD's prior intentional exclusion of African-Americans and Hispanics, and for that reason entered judgment against petitioners. Pet. App. 14-29. On March 18, 1998, the Seventh Circuit affirmed the district court's judgment. Pet. App. 1-13.

The evidence admitted at trial showed the following [1]:

The 1987 Affirmative Action Plan

The career service ranks within the CFD consist of the positions of firefighter, engineer, lieutenant, captain, and battalion chief. R. 95, Schedule A at ¶ 10. Firefighters and engineers are eligible to take the promotional examination for lieutenant. *Ibid.* Lieutenants are eligible to take the examination for captain. *Id.* ¶ 22. Captains are eligible to take the examination for battalion chief. Tr. 659.

The 1986 captains' examination consisted of three parts: a written multiple choice test given 65% weight; an oral board interview given 25% weight; and credit for seniority given 10% weight. R. 95, Schedule A at ¶¶ 23, 43. The exam was designed by the City's Personnel Department in such a manner so that it could be content-validated—shown to reflect content related to the requirements of the position. *Id.* ¶¶ 24-30. Dr. Richard Barrett, an expert in industrial psychology, psychometrics, and test development, testified that strict rank order use of the 1986 captains' examination had no demonstrable relationship to qualification for promotion. Tr. 1079-94. Given the small differences in candidates' scores, and in light of measures of validity and reliability, the rankings of the plaintiffs and the minorities receiving the challenged affirmative action promotions under the 1987 affirmative action plan were essentially tied, and

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[1] Petitioners repeatedly rely on materials that the district court excluded from evidence, briefly asserting that they "should not have been excluded." Pet. 5 n.1. But petitioners did not contest the exclusion of these materials in the court of appeals, nor in any of the questions they present for this Court's consideration. See Pet. i. Thus we will ignore all materials that the district court excluded.

there was no psychometric basis to believe that their future performance would differ. Tr. 1089-94. See also Tr. 77-79, 138 (testimony of Deputy Commissioner of Personnel Robert Joyce).

Each petitioner took and passed the 1986 captains' examination and was placed on a 1987 eligibility list. R. 95, Schedule A at ¶ 4. McNamara was ranked 152; Sullivan 153; Miller 154; Lux 157; King 159; and Dineen 166. *Id.* ¶¶ 53-58. These six petitioners were not promoted. *Ibid.* Graf was ranked 136; Scavone 138; and Sobczak 139. *Id.* ¶¶ 59-61. These three petitioners were promoted on April 1, 1992 but claimed that they would have been promoted on May 1, 1991 in the absence of affirmative action. *Ibid.*

The challenged affirmative action plan for promotions from the 1987 list was set forth in a letter dated July 9, 1987, from Commissioner of Personnel Jesse Hoskins to Fire Commissioner Louis Galante. Def. Exh. 6. Commissioner Hoskins observed that the CFD intended to make a total of 150 promotions to captain off the 1987 list. *Id.* at 1. If all promotions were made in rank order, African-Americans would have received 14% of the promotions and Hispanics would have received 4.7%. *Ibid.* At that time, 26% of the firefighters and engineers and 13.6% of lieutenants were minorities, while only 3% of captains were minorities. *Ibid.* Commissioner Hoskins concluded that the CFD should make a greater number of minority promotions than would occur by using the list in strict rank order. He cited three reasons for this conclusion: the need to comply with the 1980 consent decree entered in *United States v. Albrecht*, which required the City to promote so that the minority composition of each rank was more representative of the rank from which promotions were made: meeting the affirmative action goals of the City's collective bargaining agreement ("CBA"), which required each rank to be as close as possible to 45% black and Hispanic; and remedying past discrimination, which was still reflected in the

manifest disparity between the racial composition of the pool of incumbent captains and the qualified labor pool. Def. Exh. 6 at 1-2. He also believed that as a community service organization, the CFD needed to integrate its upper ranks to gain the trust and cooperation of the community. *Id.* at 4.

Commissioner Hoskins concluded that no race-neutral approach would achieve these objectives. Def. Exh. 6 at 3. Because only lieutenants can be promoted to captain, the City could not recruit minorities from outside the CFD, and could not make meaningful progress towards eliminating the effects of prior discrimination if it used the list in rank order. *Id.* at 1, 3.

Commissioner Hoskins therefore recommended that the CFD adopt a goal of 20% African-American and 5% Hispanic promotions. Def. Exh. 6 at 1. The difference in test scores between those receiving affirmative action promotions and those who would be promoted in strict rank order was not statistically significant. *Id.* at 4. And only those who received a passing score of 70 or above would be promoted. *Ibid.* In addition, the goals were temporary and were to be reviewed every time the CFD made promotions. *Ibid.*; Tr. 121-22.

On June 8, 1988, the City entered a "wrap-around" agreement with the United States Department of Justice ("DOJ") that supplemented the affirmative action plan. Under this agreement, before retiring the 1987 list, the CFD would promote to captain those individuals who would have been promoted had the City gone in rank order, but who were passed over to meet the goals of the affirmative action plan. Def. Exh. 8 at 2. Furthermore, if, in this last round of promotions, the City made additional affirmative action promotions, a commensurate number of rank order promotions would be made. *Ibid.* Petitioners Graf, Scavone, and Sobczak were subsequently promoted pursuant to the wrap-around agreement on April 1, 1992. Tr. 85-89. At the same time, the City made three more affirmative action promotions;

and consequently promoted three additional nonminorities ranked between 147-150. Tr. 86-87.[2]

Statistical Evidence Of Discrimination

Dr. Gerry Suchanek testified as an expert in labor economics, econometrics, and statistics. Tr. 638. Using binomial sampling model and standard deviation analysis, Dr. Suchanek conducted a series of benchmark studies spanning from 1950 to 1993 both for the entry level and the promotional ranks of the CFD. Tr. 680-81, 685-90, 710-11, 719.[3]

Given the requirements for entry and paucity of jobs with comparable benefits for the skill levels required of firefighters, Dr. Suchanek assumed that minorities would apply to the CFD in numbers equal to their representation in the census-based benchmarks for the period prior to 1974 for which he lacked actual applicant data. Tr. 699-703. Analysis of applicant flow data from the entry level exams starting in 1974 confirmed that African-Americans applied to the CFD at least proportional to their representation in the census-based benchmark and that Hispanics, although underrepresented, applied in increasing numbers after 1985, when the CFD eliminated barriers to entry. Tr. 700-02; Def. Exh. 67.

An initial series of three benchmarks for the years 1973-93 was drawn from census data for the City of Chicago. Tr. 670-71, 683, 706-07; Def. Exhs. 58, 64. Dr. Suchanek restricted each of his benchmarks to City

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[2] Rank 148 had already received an affirmative action promotion. Jt. Exh. 8.

[3] The CFD did not have racial identity information for those no longer active after 1982. Tr. 647-49. Based upon the racial composition of the CFD in 1973, as derived from the data on those active in 1983, Dr. Suchanek used a random number generator to assign race to those employed in the CFD from 1973-82 according to the technique of inferred probabilities. Tr. 649-52. If anything, Dr. Suchanek's randomization technique overestimated the number of minorities in the promotional ranks between 1973-82, especially the ranks of captain and battalion chief. Tr. 653-54; Def. Exh. 61 at 6-8; Def. Exh. 62.

residents between certain ages because these were restrictions set forth in the firefighter examination announcements from the late 1950s to present. Tr. 684, 691-94, 706-08. Dr. Suchanek did not restrict his benchmark for citizenship, which was a requirement for entry prior to 1978, for three reasons. First, census data necessarily accounts for citizenship by excluding illegal immigrants; second, there were virtually no legal immigrants from African countries; third, legal immigration from majority white countries was the same as or even larger than from Hispanic countries. Tr. 695-97. Dr. Suchanek also did not correct his benchmark from criminal background or drug usage because those were not screening requirements for application to the CFD for any time period relevant to the 1986 captains' examination. Tr. 697-98. In addition, because the examination announcements specifically stated that there was only a minimum reading comprehension requirement, Dr. Suchanek did not tailor his census-based labor pool for any educational level. Tr. 694, 698, 811. And any restriction of the qualified and interested labor pool to those who graduated high school, but had not completed four years of college—a more stringent standard than required by the CFD—only altered the disparities Dr. Suchanek observed by three to five percentage points. Tr. 788; Def. Exh. 67.

Dr. Suchanek's first, broadest benchmark compared for the years 1973-93 actual CFD racial composition with the population of the City, age 20-39. Def. Exh. 58 at 25-26; Def. Exh. 64 at Exh. 5; Tr. 709-13. The standard deviation of the aggregate number of actual non-minority personnel to expected personnel ranges from 55 standard deviations in 1973 down to 34.5 standard deviations in 1993. *Id.*

The second series of benchmarks compared the actual composition of the CFD from 1973-93 to men who resided in Chicago during that period and were between age brackets set forth in various examination announcements. Def. Exh. 58 at 17; Def. Exh. 64 at Exh. 6; Tr. 719. This series of benchmarks revealed the same devia-

tions between actual and expected CFD racial composition contained in the first benchmark, thereby demonstrating that neither age nor sex were significant discriminators. Def. Exh. 58 at 17; Def. Exh. 64 at Exh. 6; Tr. 715, 719-20.

In this third series of benchmarks, Dr. Suchanek compared the racial composition between 1973-93 of each rank within the CFD with his census-based qualified and interested labor pools. Def. Exh. 58 at 17-18; Def. Exh. 64 at Exh. 7; Tr. 720-26. Regardless of the age group, for each rank and in each year, the disparities between the actual and expected nonminority composition of the CFD greatly exceeded three standard deviations. Def. Exh. 64 at Exh. 7; Tr. 720-26.

Dr. Suchanek utilized a fourth census-based benchmark to compare actual CFD composition with what he referred to as a hypothetical CFD population for the years 1950-93. Tr. 737-39. This benchmark accounted for changes in the population and the lag time between promotion to various ranks by using the year of hire of actual CFD members. Tr. 737-38, 746. Dr. Suchanek restricted his census-based qualified and interested labor pool to account for entry requirements. Def. Exh. 61 at 4, 13; Tr. 734-35. This benchmark as well showed large disparities that could not be explained by anything other than a pattern of discrimination in hiring and promotion. Def. Exhs. 61, 63, 68; Tr. 748. Disparities ranged between 12-17 standard deviations for lieutenant; 7-10 standard deviations for captain; and 4-8 standard deviations for battalion chief. Def. Exh. 68 at 2-4. This benchmark further shows that affirmative action and nondiscriminatory hiring have not significantly reduced the effects of race-based hiring and promotion practices. Def. Exh. 61 at 15; Def. Exhs. 63, 68; see also Tr. 748-54; Def. Exhs. 67, 68 (additional benchmark demonstrating that historical gross disparities remain unexplained when adjusted to reflect actual CFD hiring practices once discriminatory hiring practices were eliminated).

Dr. Suchanek additionally conducted a series of analyses using as benchmark populations the actual racial composition of the CFD promotional ranks between the years 1973-93. Def. Exh. 58 at 17-18; Def. Exh. 61 at 16-18; Def. Exh. 64. The promotional pool for each rank was those who held the rank or ranks eligible to compete for promotion. Tr. 757-58. These analyses necessarily mask the true disparities that exist in the promotional ranks because they do not take into account the impact of past hiring and promotional practices on a rank's racial composition. Tr. 749.

In order to isolate the impact of past promotional practices, Dr. Suchanek conducted three separate analyses for the years 1950-93 comparing how long it was taking African-Americans, Hispanics, and nonminorities on average to be promoted to each career service rank. Def. Exh. 61 at 9-12; Def. Exh. 63; Tr. 761-67. His computations showed that on average prior to 1985, for all ranks, African-Americans and Hispanics spent more time in service than nonminorities. Def. Exh. 61 at 10-11; Def. Exh. 63; Tr. 762. After 1985, Dr Suchanek observed a decrease in minority time in rank which he attributed to a change in hiring and promotion practices. Tr. 763-64.

Anecdotal And Historical Evidence Of Discrimination

A number of witnesses testified to a history of intentional discrimination against African-Americans and Hispanics in the CFD from at least the 1950s into the late 1970s that began at the application stage. Witnesses testified to the perceived pretextual disqualification of African-Americans for reasons such as flat feet. Tr. 206; 240-41; 939-40. As to Hispanics, the Fire Commissioner from 1957 to 1978, Robert Quinn, R. 95, Schedule A at ¶ 7, let it be known that they were officially unwelcome in the CFD. In the 1970s, he told James Winbush, Jr. ("Winbush"), an African-American firefighter, that Hispanics "weren't tall enough to fight fires and they have to go back to Mexico." Tr. 372. See also Tr. 493-96

(testimony of Francisco de la Cerna regarding exclusion of Hispanics).

Once minorities made it through the door, they were sent to training academy classes in the 1950s through 1973 that had at most a handful of African-Americans and usually no Hispanics. Tr. 207, 375-76, 559, 871-72, 899, 921, 952. African-Americans were then assigned to segregated houses located on the south and west sides. Tr. 456, 507, 872, 922-23, 941-42, 952, 963, 982, 995.

Throughout the 1950s and 1960s, the officers at the all-black companies were nearly always white. Tr. 271, 454, 504-05, 600-01, 872, 922-23, 952, 964, 982, 995. The white officers were assigned to African-American companies as a form of punishment for disciplinary infractions. Tr. 454, 968, and would not stay in the house, Tr. 452-53, 600. For the most part, the CFD did not promote African-Americans, but instead had some African-Americans who were permanent acting officers. Tr. 334-35. The few African-Americans who were officers were almost always assigned to the African-American companies. Tr. 216, 270, 941-42. Although these African-American houses were routinely the busiest in the City, *e.g.*, Tr. 382-83, 457-59, 508, 565-66, 601, they had older equipment than the white ones, Tr. 567-68, 604-05, 876. Some of the African-American houses also were in poor condition. Tr. 210, 254-55, 953-55.

Prior to 1965, Commissioner Quinn told firefighters that the timing was not right for desegregation, Tr. 569, and that if he desegregated, "half of the Caucasians on the job would quit," Tr. 947. Francisco de la Cerna ("de la Cerna"), who is African-American, testified that he was recalled from his initial assignment to an all-white fire house and told by a CFD chief that "I made a mistake on your assignment," Tr. 502, "I thought you were one of us but I see you aren't." Tr. 503.

Segregation was so rigidly enforced throughout the 1950s through the mid-1960s that the black fire houses had more firefighters than needed. Tr. 509-10, 566, 601-

02, 845. The men consequently had a process by which they would select who would go home for the night. Tr. 566-67, 601-02. Despite this overstaffing, prior to 1965, African-Americans were not detailed out to white houses. Tr. 456, 563, 600, 874.

As late as the 1970s, the CFD had a policy of denying African-Americans' requests to transfer to white houses. *E.g.*, Tr. 459, 875, 923-24, 964-65, 988-89. Indeed, requests for transfers to white companies by black firefighters apparently set off alarm among the CFD hierarchy. *E.g.*, Tr. 602-03 (testimony of Elwain Parks, who is African-American, regarding CFD chief's investigation of his request to transfer).

The only integrated houses prior to 1965 were three of the snorkel squads, as well as Truck 42 and Engine 82, all of which were integrated in 1962. Tr. 376-77, 845, 965. These units were predominantly white with a few blacks in them. Tr. 377. Commissioner Quinn referred to the snorkel squads as "freedom wagons" and used them as showpieces for CFD publicity. Tr. 376-77, 464.

On August 13, 1965, the west side of Chicago erupted in violence—much of it aimed at the CFD—over the death of Dessie Mae Williams ("Williams"). Def. Grp. Exh. 107; Tr. 609. Williams, an African-American, was killed when the all-white Truck 26 drove out of its house in a predominantly African-American neighborhood with an unmanned tiller, striking a sign, which in turn fell on Williams. Tr. 212-13, 572, 924-26, 996; Def. Grp. Exh. 107. During the rioting, African-American firefighters were ordered to Truck 26's house "to more or less pacify the neighbors at that time. They were asking where were the black firemen." Tr. 926; see also Tr. 572, 609, 996.

In response to the riots, the CFD disbanded some of the all-black companies and transferred the men to previously all-white companies on the south and west sides. Tr. 572-73, 927, 955; Def. Exh. 94. These fire houses on average had one African-American per shift. Tr. 213-14,

275-77, 884, 928, 955-56, 985-86. Other companies remained predominantly African-American for several years following the riots. Tr. 337-40.

Discrimination continued in the CFD into the late 1970s. For instance, for several days after his 1969 assignment to the all-white Truck 34, Winbush came to work only to be told by the officer on duty that he was not on his shift, and should go home and come back for the next shift. Tr. 341-42. This went on until the division marshal intervened. *Id.* at 342. Once Winbush started work, the white men welcomed him by stating that they had previously run out another black firefighter and they would run him out as well. Tr. 343. A series of incidents followed, including one in which someone wrote "nigger" on his locker. Tr. 344. Winbush's assignment to Truck 34 ended when he called the police to investigate after he had found in the fire house backyard his uniform with a bunch of holes in it and his fire clothes, which he had to pay for himself, ripped up. Tr. 345. The fire captain or lieutenant told the police that neighbors had broken into the firehouse. Tr. 345-46. The police called for an evidence technician to lift fingerprints. Tr. 346-47. While the police were there, the Chief of Personnel called Winbush and told him " 'you're in a bunch of trouble. You're going to the shine truck.' " Tr. 347. Winbush was then transferred to the predominantly African-American Truck 42. Tr. 347-48.

De la Cerna met with similar hostility when he sought redress for discriminatory treatment as an engineer in 1967. He testified that his white captain forced him to give up his prime-time June 1967 furlough to a white firefighter candidate, despite de la Cerna's seniority (which was how furloughs were chosen at the time). Tr. 516-18. De la Cerna completed a form to file charges of race discrimination against his captain. Tr. 518-19. He had a difficult time submitting the charges "because nobody would take them." Tr. 519. Eventually, one chief finally signed and forwarded the charges. *Ibid.*

After his charges were submitted, de la Cerna was told to report to Commissioner Quinn's office for 10 days in a row. Tr. 523. Each day de la Cerna waited from morning until mid- to late-afternoon, at which point Quinn's secretary would tell de la Cerna that Quinn was not coming into the office and he should return the next day. Tr. 524. At the end of 10 days, Commissioner Quinn told him to go back to his company. *Ibid.* The CFD took no action on de la Cerna's complaint until a lawyer intervened on his behalf. Tr. 529-32. In the meantime, nonminority firefighters in de la Cerna's house retaliated against him for submitting the charges. Tr. 520-21. When de la Cerna was transferred in 1967 or 1968, Tr. 524-25, his new captain told him that word was that he was a "bad nigger" and he would " 'never get a company as long as [he was] in the Second Division.' " Tr. 526.

In addition to these specific incidents, other firefighters told of being called derogatory names; firehouses with beds in which only African-American firefighters slept; being excluded from the dining room; and having nonminorities refuse to help them with their household duties, even though the nonminorities helped one another. *E.g.*, Tr. 278-79, 608, 614-15, 996-97. Witnesses also testified that minorities were not given the opportunity to "act-up"—take on the responsibilities for missing officers—at all-white companies, even when they had more seniority than the other firefighters. *E.g.*, Tr. 214-15, 238-39, 387-88, 902, 988.

In the late 1960s and early 1970s, the CFD and City initiated minority recruitment activities. Tr. 112-13, 116, 193-94, 235. This initial recruitment had little impact; by 1973-74, at most, 205 African-Americans, or 4%, were on the job, Tr. 115, 353, and there were fewer than 20 Hispanics, out of a total of approximately 4500 CFD personnel. Tr. 114-16, 235. Entire sections of the CFD remained all-white through the 1970s. Tr. 114, 219, 280-83, 971, 1050, 1056. And several African-American witnesses testified that in the 1960s and early 1970s they

were told by white superiors that they would never get promoted. *E.g.*, Tr. 873, 916. From the 1940s through the 1980s, on average there was only one black battalion chief at a time. *E.g.*, Tr. 407, 476-83, 858-59. For example, Louis Galante testified that when he become fire commissioner in 1983, not one of the 109 battalion chiefs was a minority and only 9 or 10 of the 159 captains were minority. Tr. 858-59.

CFD Litigation History

In 1973, the United States sued the City, alleging that the CFD's hiring and promotional practices unlawfully discriminated against African-Americans and Hispanics. The district court denied the United States' motion for a preliminary injunction to enjoin use of the 1968 hiring examination results. Def. Exh. 86(a). The United States appealed, and the court of appeals granted a stay pending appeal. Def. Exh. 86(b). While the appeal was pending, the City determined that it could not successfully defend the hiring claims. Accordingly, the City entered into a consent decree in 1974 providing an interim 50% hiring ratio for minorities for four years and a long-range goal of increasing the minority composition of the CFD to become more representative of the City as a whole. Def. Exhs. 86(c) and 86(d).

Rather than hire minorities under this consent decree, the City between 1974-77 hired no firefighters and made no promotions. *E.g.*, Tr. 221-22, 285, 292, 769. This decision was justified by neither tactical changes, Tr. 855, nor budgetary constraints, Tr. 821. Although Commissioner Quinn told Winbush during this period that the CFD did not need anybody, Tr. 350, Quinn also one day walked up to Winbush, pushed his finger into Winbush's chest, shoved him against a wall and asked: " 'What's your problem, kid? You got a job. Your brother's got a job. Your daddy's got a job, he is going to be a chief, you are going to be a lieutenant, your brother is going to [be] a lieutenant. What are you worrying about them

niggers for? They're only going to come in and screw up our job.' " Tr. 374.

The lack of hiring, combined with attrition, left fire companies severely understaffed, hindered fire operations, and harmed morale. *E.g.*, Tr. 225-27, 284-85, 356-60, 485-88, 573-75. The shortstaffing not only led the CFD to forgo disciplinary suspensions, Tr. 357, but also led to the recall of firefighters discharged for disciplinary reasons. Tr. 540-42. Many witnesses testified that all of these conditions caused the 1980 firefighters strike. *E.g.*, Tr. 227, 297-98, 360.

The lack of hiring also led the United States to seek enforcement of the 1974 consent decree. Def. Exh. 90. In 1977, the district court entered an order requiring compliance with the interim 50% minority hiring goal. *Ibid.* A supplemental hiring order was entered in September 1978 allocating 120 of the 280 entering vacancies to blacks or Hispanics. Def. Exh. 87. In June 1979, an agreed hiring order provided that if the new 1979 hiring eligibility list were used for more than two years or 500 names, all additional hiring was to be done on the basis of a 50% minority hiring ratio. Def. Exh. 88. This order also retained the long-range hiring goal from the 1974 consent decree. *Ibid.*

Those minorities that had been hired pursuant to court order encountered discrimination. Benny Crane, who is African-American, worked as a trainer at the fire academy in 1977 when the first class of firefighters with a large percentage of minorities began. Tr. 575. He testified that several high ranking CFD officials told the trainers that " 'they can make us hire [minorities] but they can't make us keep them,' " Tr. 576; and " 'We're not going to allow [minorities] to take over this Department,' " Tr. 579. Consequently, the training for the 1977 class was made very comprehensive and demanding. Tr. 576-77.

With regard to the promotional examinations, the district court initially upheld their validity under Title

VII. The United States appealed, and the court of appeals reversed and remanded the case for further proceedings. *See United States v. City of Chicago*, 573 F.2d 416, 429 (7th Cir. 1978). At that point, the City administered in 1978 new promotional examinations for each CFD rank.

Rankings on the 1978 lieutenants' and captains' examinations were based on an applicant's score on a written multiple choice test (40%); efficiency ratings (30%); and the score on an oral examination (30%). Tr. 90-91. The efficiency rating consisted of supervising officers' evaluations—with little or no guidance—on quality of work, quantity of work, dependability, attendance and promptness, and interpersonal relations. Tr. 182, 855-56. The ratings were completed in pencil and were passed up the chain of command to the fire commissioner, who had the final word. *E.g.*, Tr. 295-96, 386, 418. When Louis Galante took over as Fire Commissioner in 1983, he determined that approximately 40% of the nonminority officers had received efficiencies above 90, and nearly all the blacks had received efficiencies "down below 80, 82, 84." Tr. at 862. See also Tr. 386, 589-92, 887-88, 909, 959, 971-72, 992, 998-99.

In early 1980, DOJ notified the City that it intended to file suit over the 1978 examinations because of their severe adverse impact upon minorities. The City concluded that the exams had not been adequately validated, and that the efficiency ratings were racially discriminatory. Tr. 90, 107, 117; Def. Exhs. 29-36; 40-47. Because the City concluded that it could not defend these exams, it entered into the *Albrecht* consent decree. Tr. 108-09, 117. In the decree, the City agreed to a 1 minority/4 white promotional ratio for the ranks of lieutenant and engineer until new, validated promotional exams could be given. Def. Exh. 90. For the ranks of captain and battalion chief, this ratio was not feasible because there were too few minorities in the qualifying ranks to implement such a ratio. *Id.* Instead, the City agreed to implement a long-

term goal to increase substantially minority participation at every rank so that the composition of each rank would become more representative of the rank below it from which promotions were made. *Id.*

ARGUMENT

In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), this Court held that race-based affirmative action should be assessed under the strict scrutiny test. See *id.* at 494. Under strict scrutiny, a program "must serve a compelling governmental interest, and must be narrowly tailored to further that interest." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995).

This test still permits state and local governments to take remedial action rather than merely ceasing discriminatory practices; thus, the government may act affirmatively to redress the continuing effects of prior discrimination. In *Croson*, for example, the Court made clear that municipalities have a compelling interest in remedying the continuing effects of prior discrimination. See 488 U.S. at 492-93 (plurality opinion); *id.* at 511 (Stevens, J., concurring in part and concurring in the judgment); see also *Local No. 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501, 515-16 (1986); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274-75 (1986) (plurality opinion). Moreover, a majority of the Court acknowledged that "some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion." 488 U.S. at 509 (plurality opinion); accord *id.* at 511 & n.1 (Stevens, J., concurring in part and concurring in the judgment); *id.* at 519 (Kennedy, J., concurring in part and concurring in the judgment). See also *Wygant*, 476 U.S. at 280 (plurality opinion) ("to remedy the effects of prior discrimination, it may be necessary to take race into account"). And in *Adarand*, the Court took pains "to dispel the notion that strict scrutiny is 'strict in theory, fatal in fact.'" 515 U.S. at 237 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J.,

concurring in the judgment)). Indeed on two occasions race-conscious affirmative action has been sustained under strict scrutiny. See *United States v. Paradise*, 480 U.S. 149 (1986) (four-justice plurality upholding promotional quota for minorities in a state police department); *Local No. 28 of the Sheet Metal Workers' International Association v. EEOC*, 478 U.S. 421 (1986) (upholding remedial order requiring union apprenticeship program to admit minorities).

Here, the district court applied strict scrutiny and found the 1987 affirmative action plan narrowly tailored to redress the pattern of racial exclusion of the type that the Court acknowledged in *Croson* would justify such a plan. Petitioners never claim that the district court failed to apply strict scrutiny. Instead, they criticize the manner in which both the district court and the court of appeals weighed the evidence. In fact, the evidence before the district court established that the manifest underrepresentation of minorities in the upper ranks of the CFD was the product of years of intentional exclusion of minorities who were otherwise fully qualified and eager to advance into the CFD's hierarchy. After years of discrimination at the entry level and in the lower ranks had left the Department hierarchy artificially white, some measure of affirmative action was constitutionally permissible to redress the continuing effects of prior discrimination. Thus, the conclusions of the courts below regarding the sufficiency of the CFD's basis for taking remedial action were amply supported by the evidence adduced at trial, and the judgment below was correct. And in any event, there is no justification for plenary review in this case merely to reweigh the evidence as petitioners urge.

1. Petitioners' first contention is an entirely fact-bound claim that the statistical, anecdotal, and historical evidence presented at trial failed to support the finding that the underrepresentation of minorities at the rank of fire captain represented the continuing effects of prior discrimination. See Pet. 9-10. The record does not support

that claim, which is inappropriate for this Court's consideration in any event.

The propriety of relying on statistical evidence in order to justify affirmative action is quite clear. It has long been the law that statistical evidence of a clear racial imbalance between an employer's workforce and the qualified labor pool creates a prima facie case of intentional racial discrimination. See, *e.g.*, *Hazelwood School District v. United States*, 433 U.S. 299, 308-13 (1977); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335-43 (1977). For this reason, in *Croson* the Court explained that such a statistical showing justifies remedial action. See 488 U.S. at 501-02; see also *id.* at 509 (plurality opinion); *Wygant*, 476 U.S. at 274 (plurality opinion). Indeed, courts applying strict scrutiny have consistently upheld affirmative action when supported by such statistical evidence. See, *e.g.*, *Aiken v. City of Memphis*, 37 F.3d 1155, 1163 (6th Cir. 1994); *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1553-57 (11th Cir. 1994); *Jansen v. City of Cincinnati*, 977 F.2d 238, 242 (6th Cir. 1992), cert. denied, 508 U.S. 911 (1993); *Vogel v. City of Cincinnati*, 959 F.2d 594, 599-600 (6th Cir.), cert. denied, 506 U.S. 827 (1992); *Stuart v. Roche*, 951 F.2d 446, 450-52 (1st Cir. 1991), cert. denied, 504 U.S. 913 (1992); *Donaghy v. City of Omaha*, 933 F.2d 1448, 1459-60 (8th Cir. 1991), cert. denied, 502 U.S. 1059 (1992).

As the courts below noted, the evidence here showed an undeniably statistically significant disparity between the racial composition of the qualified labor pool and the upper ranks of the CFD. See Pet. App. 7-8, 22-23. That evidence provided a sufficient basis for the conclusion that the underrepresentation of minorities was the result of prior discrimination. In fact, petitioners do not launch any attacks against the methodology employed by the statistician who testified on behalf of the City.[4] And, as

[4] The propriety of binomial probability analysis of the type Dr. Suchanek employed as a method for inferring discrimination has

we explain above, Dr. Suchanek conducted an increasingly restrictive series of benchmark studies that demonstrated not only gross statistical disparities between the expected and actual racial composition of the ranks of the CFD, but also that minorities were interested and qualified for hiring and promotion but were unable to enter and advance in the CFD at the rate of nonminorities until the CFD abandoned discriminatory hiring and promotional practices. Equally important, Dr. Suchanek also found gross statistical disparities between the composition of the upper ranks of the CFD and the pool of those actually hired, confirming the existence of discrimination even within the pool of those interested in and qualified for employment. Indeed, such evidence has consistently been held sufficient to establish the existence of discrimination against minorities in the pool of those qualified for employment. See *Boston Police Superior Officers Federation v. City of Boston*, 147 F.3d 13, 21 (1st Cir. 1998); *Aiken*, 37 F.3d at 1163; *In re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525, 1540-41 (11th Cir. 1994), cert. denied, 514 U.S. 1065 (1995); *Vogel*, 959 F.2d at 599-600; *Stuart*, 951 F.2d at 450-52; *Donaghy*, 933 F.2d at 1460; *Howard v. McLucas*, 871 F.2d 1000, 1007 (11th Cir.), cert. denied, 493 U.S. 1002 (1989).

Petitioners' only complaint about the statistical evidence is that it "was too remote in time to justify preference . . . ." Pet. 9. And they correctly cite *Brunet v. City of Columbus*, 1 F.3d 390 (6th Cir. 1993), cert. denied, 510 U.S. 1164 (1994), for the proposition that evidence of discrimination many years prior to the adoption of an affirmative action plan is, standing alone, too remote to establish the continuing effects of that discrimination. See *id.* at 409. But here, Dr. Suchanek docu-

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been long settled. See, *e.g.*, *Castenada v. Partida*, 430 U.S. 482, 496-97 n.17 (1977). Differences in excess of two or three standard deviations, like those present here, generally demonstrate the existence of discrimination. See, *e.g.*, *Hazelwood*, 433 U.S. at 308 n.14.

mented that in 1987 there was a continuing effect on the composition of the rank of fire captain because of prior entry level and promotional discrimination. As Dr. Suchanek testified, the percentage of minorities that had been eligible to seek promotion to captain prior to the 1986 examination was artificially low as a result of prior discrimination: only those few minorities hired by 1977 could even theoretically have reached the qualifying rank of lieutenant and taken the previous captain's examination, given in 1979, and then sought promotion. See Tr. 71. The prior exclusion of minorities, continuing as it did until at least 1977, plainly had continuing effects in 1987, as the district court correctly found. See Pet. App. 21-23. As the plurality wrote of an analogous situation in *Paradise*: "Discrimination at the entry level necessarily precluded blacks from competing for promotions, and resulted in a Departmental hierarchy dominated exclusively by nonminorities." 480 U.S. at 168. Accord *Boston Police Superior Officers Federation*, 147 F.3d at 20.

The statistical evidence was bolstered by the historical and anecdotal evidence of the CFD's hostility to minorities, showing a climate of racial hostility that went all the way to the top of the CFD and persisted at least until the 1980 *Albrecht* decree and the CBA. To this petitioners respond only that such evidence "will rarely, if ever, show a systemic pattern of discrimination." Pet. 9. Of course, in this case, the anecdotal and historical evidence did not stand alone; as we explain, it supplemented, and was powerfully bolstered by the statistical case. Indeed, given the strength of the statistical case, the pattern of hostility that was proven through the anecdotal and historical evidence can be viewed simply as making it more implausible that the underrepresentation observed by Dr. Suchanek had some nondiscriminatory explanation. But, in addition, this evidence explains as well why minorities would have perceived the CFD to be a hostile environment. There is thus every reason to believe minority applications would have been greater—as they eventually were—

but for this racial climate. Accordingly, even if anecdotal evidence alone would not have been sufficient to warrant affirmative action, the combination of anecdotal and statistical evidence is "potent." *Coral Construction Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991), cert. denied, 502 U.S. 1033 (1992); see *Associated General Contractors of California, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1415 (9th Cir. 1991), cert. denied, 503 U.S. 985 (1992); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir.), cert. denied, 498 U.S. 983 (1990). See also *Teamsters*, 431 U.S. at 337-39 (statistical evidence of disparity between workforce and qualified labor pool bolstered by anecdotal evidence established intentional discrimination against minorities).[5]

Petitioners also observe that "[r]acial remarks unrelated to the decisional process are insufficient to demonstrate that the employer relied on illegitimate criteria, even when such statements were uttered by a decisionmaker." Pet. 9. Petitioners do not explain, however, how this proposition is applicable in this case. As the courts below noted, the evidence showed here that the senior officials of the CFD were hostile to minorities and adopted policies designed to exclude them from the Department. See Pet. App. 9-10, 24-26. And, as we explain above, there was abundant evidence that those running the CFD wanted to keep minorities out. Commissioner Quinn, for example, was willing to halt all hiring—even at the risk of endangering public safety—rather than comply with federal court orders directing the CFD to cease discriminatory practices.

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[5] To support their attack on the historical and anecdotal evidence, petitioners cite only *Middleton v. City of Flint*, 92 F.3d 396 (6th Cir. 1996), cert. denied, 117 S. Ct. 1552 (1997). There the anecdotal evidence was not supplemented by an appropriate statistical showing, which was found wanting because it did not compare the composition of the workforce to the composition of the qualified labor pool. See *id.* at 405-09.

2. Petitioners make an even narrower attack on the evidence relating to prior discrimination against Hispanics, claiming that they were only "randomly included" in the 1987 affirmative action plan. Pet. 11. In fact, the evidence relating to Hispanics differed from that relating to African-Americans only in that it showed that Hispanics had not applied to become firefighters in proportion to their representation in the qualified labor pool until the 1980s. See Pet. App 8. That deficiency, however, is largely explained by the CFD's undefensible use of a height requirement that discriminated against Hispanics. See Pet. App. 26. In any event, the statistical evidence, as we explain above, showed that until 1985 Hispanics, like African-Americans, were discriminated against in promotions, and that evidence was bolstered by direct evidence that senior officials in the CFD up to and including the Fire Commissioner were hostile to the presence of Hispanics in the Department. Indeed the district court expressly credited the statistical evidence regarding Hispanics, as well as the direct evidence that the CFD wished to exclude Hispanics from its ranks. See Pet. App. 21-23, 26-27. For their part, petitioners do not explain why the absence of statistical evidence of prior entry level discrimination forecloses as a matter of law the 5% promotional goal for Hispanics on the 1987 captain's examination, given the abundant statistical evidence that Hispanics faced promotional discrimination and were grossly underrepresented at the rank of captain when compared to their representation in the ranks below, as well as the direct evidence of the Department's animosity toward Hispanics.

Petitioners also do not explain why the promotional goal for Hispanics has any meaningful significance to the outcome of this case. The promotional goal for Hispanics under the 1987 plan was 5%, and had the promotional list been used in strict rank order, 4.7% of the persons promoted would have been Hispanic. See Def. Exh. 6 at 1. A .3% measure of affirmative action, not shown to

have actually resulted in the promotion of more Hispanics than otherwise would have been promoted, hardly warrants plenary review.

3. Petitioners also attack the 1987 affirmative action plan on the ground that it is not an appropriate remedy for "isolated racial remarks." Pet. 10. Again, while we have no quarrel with this proposition, petitioners' attempt to dissect this case into these individual components ignores the elaborate and comprehensive record here. The evidence at trial established much more than "isolated racial remarks." Rather, the statistical evidence demonstrated a widespread and systemic pattern of excluding minorities from hiring and promotional opportunities, and the historical and anecdotal evidence—including the racial remarks—made it all the more unlikely that the statistics had any innocent explanation. And based on this evidence, the district court found systemic discrimination (Pet. App. 21-27), and that finding was upheld on appeal (Pet. App. 7-10).

Petitioners do not claim that any circuit has reached a result contrary to the holding below on similar facts. Indeed, as we explain above, courts have consistently upheld affirmative action plans based on a combination of statistical and anecdotal evidence. In fact, the circuits are unanimous that in the face of such evidence, a public employer is entitled to depart from the rank order use of hiring or promotional lists. See, *e.g.*, *Boston Police Superior Officers Federation*, 147 F.3d at 22; *Edwards v. City of Houston*, 37 F.3d 1097, 1110-15 (5th Cir. 1994), vacated on other grounds en banc, 78 F.3d 983 (1996); *Peightal*, 26 F.3d at 1557-58; *Jansen*, 977 F.2d at 243-44; *Donaghy*, 933 F.2d at 1460-61; *Davis v. City and County of San Francisco*, 890 F.2d 1438, 1446-47 (9th Cir. 1989), cert. denied, 498 U.S. 897 (1991); *Howard*, 871 F.2d at 1009.

Perhaps recognizing that there is at least statistical evidence of systemic discrimination in this case, petition-

ers add that the underrepresentation of minorities at the rank of captain when compared to the ranks below "was obviously the result of quotas in the lower ranks and not the result of discrimination in hiring or promotion." Pet. 11. This assertion, made without citation to the record, is inconsistent with the findings of the district court, sustained on appeal, that minority underrepresentation was the result of prior discrimination. Those findings were amply supported by the evidence. And petitioners adduced no evidence to support their claim that the composition of the ranks of firefighter and lieutenant was tainted by court orders or other affirmative action measures requiring the CFD to hire less qualified minorities; they only speculate on this point. In fact, the district court found that no unqualified minorities had been promoted to the rank of lieutenant as a result of prior court orders (Pet. App. 27-28), and as we explain above the racial composition of the rank of captain was far different than the composition of the rank of lieutenant—a result Dr. Suchanek found had no nondiscriminatory explanation. After surveying the evidence, the court of appeals, even acknowledging the possibility that the percentage of minorities in the CFD "may be inflated to some extent by affirmative action" (Pet. App. 11), concluded that the evidence showed "that, had it not been for the City's discrimination against blacks and Hispanics in the past, the percentage of black and Hispanic captains would be at least a third of the potential applicant pool; and that is all it is, even with the affirmative action challenged here." Pet. App. 11-12.

Petitioners' final complaint about the remedy employed in the 1987 affirmative action plan is to assert that "[t]he City did not explore race-neutral alternatives to increase minority representation in the captain rank. . . ." Pet. 11. The record does not support this assertion. Commissioner Hoskins concluded that race-neutral alternatives could not remedy the continuing effects of prior discrimination because only incumbent lieutenants can be pro-

moted to the rank of captain, and if the 1987 promotional list were used in strict rank order meaningful progress could not be made toward eliminating the gross underrepresentation of minorities in that rank attributable to prior discrimination. See Def. Exh. 6 at 1, 3. And as the district court found, the City had in fact used race-neutral means to provide training and study materials for the captain's examination. See Pet. App. 27. Petitioners do not even identify a race-neutral means the City could have used to redress the continuing effects of its prior discrimination at the rank of captain—it could hardly have located the victims of discrimination occurring many years earlier and suddenly made them fire captains. Thus, on this record, some departure from strict rank order use of the list was the only way to redress prior discrimination. And as we explain above, this type of remedy has been consistently upheld in other circuits. A public employer, faced with gross underrepresentation or minorities in the upper reaches of its work force as the consequence of its own prior discrimination, is not required to wait until all the incumbents hired and promoted under the prior discriminatory system retire before it can begin to redress the continuing effects of that prior discrimination. Rather, "[s]ome promptness in the administration of relief [i]s plainly justified." *Paradise*, 480 U.S. at 180 (plurality opinion).

The remedy utilized by the 1987 affirmative action plan is entirely consistent with strict scrutiny. To determine whether a race-conscious remedial plan is narrowly tailored under the strict scrutiny test, a court should examine "the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor markets; and the impact of the relief on the rights of third parties. *Paradise*, 480 U.S. at 171 (plurality opinion). Accord, *e.g.*, *Sheet Metal Workers*, 478 U.S. at 480-81 (plurality opinion); *id.* at 485-86 (Powell, J., concurring in part

and concurring in the judgment); *Stuart*, 951 F.2d at 453-55; *Associated General Contractors*, 950 F.2d at 1416-18; *Donaghy*, 933 F.2d at 1460-61. The 1987 affirmative action plan satisfies each of these requirements.

First, as we explain above, some race-conscious relief was necessary. The only race-neutral means of assisting minorities—providing study materials to facilitate knowledge of the material to be tested—had been utilized for the 1987 examination. Beyond that, only a departure from rank order was available, because only the lieutenants who have passed the examination can be promoted, and rank order use of the list would have made no progress toward ameliorating minority underrepresentation at the rank of captain.

Second, the affirmative action promotions involved a limited and flexible goal. The plan envisioned promoting only minorities who had passed the 1986 examination with scores statistically indistinguishable from the non-minorities they passed over, all of whom were eventually promoted under the wrap-around agreement. The plan would be periodically reviewed and persist only until statistically significant imbalances had been ameliorated. Limiting affirmative action to an identifiable objective and fully qualified individuals "is an important indicium of narrow tailoring." *Mackin v. City of Boston*, 969 F.2d 1273, 1278 (1st Cir. 1992), cert. denied, 506 U.S. 1078 (1993).

Third, the promotional goal of 20% African-Americans and 5% Hispanics was not excessive when compared to the promotions that would have been made had the list been used in strict rank order, which would have awarded promotions to 14% African-Americans and 4.7% Hispanics. Had promotions been made only in proportion of minority representation in the qualified labor pool, of course, the disparity between the ranks of captain and lieutenant would have persisted for decades, until all the incumbents hired and promoted under the prior dis-

criminatory system had retired. Thus some increment over the minority composition in the qualified labor pool was appropriate to make some meaningful progress toward ameliorating racial imbalance. This Court recognized this same reality in *Paradise*, when it approved a 50% promotional plan until 25% of the rank had become African-American in order to achieve some promptness in relief. See 480 U.S. at 179-82. And as we explain above, the court of appeals surveyed the evidence and acknowledged that the CFD's affirmative action plan did no more than approximate what the rate at which minority promotions would have been absent prior discrimination. See Pet. App. 11-12.

Finally, the affirmative action promotions at issue did not unduly trammel the interest of nonminorities. The wrap-around agreement, under which every nonminority passed over for affirmative action reasons was eventually promoted, meant that the plan in practice involved at most a one-year delay in promotions for three nonminorities. As the plurality explained in *Paradise*, " '[d]enial of a future employment opportunity is not as intrusive as loss of an existing job' and plainly postponement imposes a lesser burden still." 480 U.S. at 183 (plurality opinion) (quoting *Wygant*, 476 U.S. at 282-83 (plurality opinion) (citations omitted)). Accord *Boston Police Superior Officers Federations*, 147 F.3d at 24.

As we explain above, a number of other circuits, like the court of appeals in this case, have endorsed the use of a limited number of non-rank-order promotions to address gross racial imbalances attributable to prior discrimination. Petitioners do not identify any decision in any circuit that forbids the use of such a remedy on facts remotely resembling these. And in any event, the fact-bound question whether the particular evidence in this case supported the conclusion of the courts below that the CFD had engaged in a pattern of systemic exclusion of minorities, rather than merely "isolated racial remarks"

that petitioners correctly state would not justify this affirmative action plan, does not merit plenary review.

4. The closest petitioners come to raising any issue of general significance is their claim that the question whether a public employer has a sufficient justification to engage in affirmative action is a question of law subject to independent appellate review, rather than a question of fact to be reviewed deferentially. See Pet. 12-13. As they correctly note, other circuits have concluded that " 'whether a strong basis in evidence of past or present discrimination exists, thereby establishing a compelling state interest for the municipality to enact a race-conscious [remedy], is a question of law' subject to plenary review." *Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 91 F.3d 586, 596 (3d Cir. 1996), cert. denied, 117 S. Ct. 953 (1997) (quoting *Concrete Works of Colorado v. City & County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994), cert. denied, 514 U.S. 1004 (1995)).

The decision below, however, is not inconsistent with the law in other circuits. At no point did the court of appeals announce that it would defer to the district court's conclusion that the City had a constitutionally sufficient predicate for engaging in affirmative action. Rather, in the words of the court of appeals, it would afford "proper weight to the district judge's findings of fact." Pet. App. 7. Of course, even in affirmative action cases, there are findings of fact to be made by the district courts. For example, here the district court found that the hiring and promotional practices utilized by the CFD in the 1970s and 1980s were intended to disadvantage minorities. See Pet. App. 9-10. And when the court of appeals deferred to this finding, it did no more than apply the settled rule that the question of discriminatory intent is one of fact on which a district court's findings should be upheld unless clearly erroneous. See *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-76 (1985). At the same time, in evaluating what types of justifications for affirmative action would be constitutionally acceptable, the court of

appeals treated the question as one of law to be independently reviewed on appeal. See Pet. App. 5-6. Thus, the decision below is entirely consistent with the approach of other circuits.

5. Finally, and quite inexplicably, petitioners claim that the courts of appeals "incorrectly affirmed the district court's finding that 6 of the 9 petitioners would not have been promoted if promotions were made in rank order." Pet. 13. This appears to be a reference to the district court's ruling on standing. After trying the case on the merits, the district court found that six petitioners lacked standing because absent the 1987 affirmative action plan, the City would have only promoted applicants up to rank 146, and accordingly would not have promoted the petitioners ranked beyond that. See Pet. App. 18-19. The court of appeals, however, declined to decide that issue, instead reaching the merits and holding the 1987 affirmative action plan to be constitutional. See *id.* 4-5, 11-12. Thus, these six petitioners were ultimately not prejudiced by the district court's ruling on this point, since the court of appeals reached their attack on the affirmative action plan at issue and rejected it on its merits. Accordingly, the correctness of the district court's standing ruling is, at this stage of the litigation, an entirely academic point.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

BRIAN L. CROWE
Corporation Counsel of the
City of Chicago
LAWRENCE ROSENTHAL *
Deputy Corporation Counsel
BENNA RUTH SOLOMON
Chief Assistant Corporation
Counsel
RUTH MASTERS
Assistant Corporation Counsel
City Hall, Room 610
Chicago, Illinois 60602
(312) 744-5337
Attorneys for Respondents

* Counsel of Record

(3)

Supreme Court, U.S.
FILED
OCT 14 1998
CLERK

No. 98-128

In The

Supreme Court of the United States

October Term, 1998

JAMES A. McNAMARA, JOHN J. SULLIVAN, THOMAS R. MILLER, CHARLES W. LUX, WILLIAM T. KING, CHARLES E. DINEEN, RICHARD A. GRAF, HENRY T. SCAVONE AND PAUL B. SOBCZAK,

Petitioners,

v.

CITY OF CHICAGO, A MUNICIPAL CORPORATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF

KIMBERLY A. SUTHERLAND
Counsel of Record
703 S. Dearborn
Chicago, IL 60605
(312) 726-0045
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

I.

The City has failed to identify any practice that intentionally excluded blacks or Hispanics from the opportunity for hire or promotion because of their race or ethnicity.

Introduction

The City of Chicago ("the City") acknowledges that it needed to present a strong basis in evidence that quota promotions to captain, in 1991-92, were a narrowly tailored remedy for lingering effects of specifically identified practices designed to intentionally exclude blacks and Hispanics from promotion based upon their race or ethnicity. (City's brief, p.16)

The City does not dispute that the issue of whether it presented a strong basis in evidence was an issue of law, and should have been examined by the Court of Appeals under plenary review, rather than giving deference to the district court's conclusions. (City's brief, p.28)

In its brief in opposition, the City has failed to point to evidence to support the Court of Appeal's finding that fire department officials carried out racial policies and demonstrated uncongeniality into the 1980s. (Pet. App. 9-10) Further, the City has failed to identify any practice that intentionally excluded blacks or Hispanics from the opportunity for hire or promotion because of their race or ethnicity. To the contrary, the undisputed evidence was that the City targeted recruiting at blacks and Hispanics since the 1960's, and imposed hiring and promotion quotas since the 1970's. (Pet. for Cert., pp.4-7)

The City does not dispute that two judges found that it did *not* intentionally discriminate in either hiring or promotion, after legal challenges to its hiring and promotion practices by the United States. (Pet. for Cert., pp.2-3)

Despite its court victories, the City agreed to hiring and promotion quotas. In both the 1974 consent decree for hiring quotas, and the 1980 settlement order for promotion quotas, the express purpose was to create racial balance between every rank of the CFD with the general population. The city defendants expressly pointed out: "nor is there to be any implication of an admission,

that they or any of them have violated any provisions of Title VII . . . " (R.91, tab E, pp.2-3, tab Q, p.2)

Medical disqualifiers for entrance

In an attempt to show a past discriminatory practice, the City states: "witnesses testified to perceived pretextual disqualification of African Americans for reasons such as flat feet". (City's brief, p.8)

Actually, the City put on *only two* witnesses who saw blacks disqualified for physical/medical reasons, one *in 1948* and the one *in 1959*. Nevertheless, whites as well as blacks have been disqualified for flat feet, and other medical reasons. (R. 149, T. 240-242) (T. 939-40, 1044-45, 1048, 1054)

The City produced no evidence that physical/medical hiring requirements were pretextual, nor that they applied only to blacks.

Failure to hire anyone between 1974-77

The City makes a totally unsupported representation, that "rather than hire minorities under the consent decree, the City between 1974-77 hired no firefighters and made no promotions". (City's brief, p.13)

The City produced no evidence that the lack of hiring between 1974-77 was racially motivated. The hiring was done according to budget, and the City's own witness, retired black battalion chief Oswald Lewis, testified that, during that time period, the CFD was experimenting with smaller regular companies, supplemented by seven back-up squads. Further, the manpower reduction had begun in 1969, five years before the hiring consent decree. Lewis was captain of one of the back-up squads, from 1969 to 1974. This structuring of the CFD, with smaller companies with back-up squads, was initiated upon a consultant's advice, who had made a survey of the City. (T. 443, 473-75, 484).

Also, in 1976 and 1976, the City hired approximately 200 employees for the CFD into the newly created job category of paramedic, which lessened the need to hire firefighters since, previous to that time, firefighters had manned ambulances. (R. 136-2, Pl.Exs.9, pp.58-63 & 9a) (T. 866-868).

In 1976, the City budgeted 300 vacancies for entry-level firefighters. (R. 136-2, Pl.Ex.34). In 1977, the City certified 253 firefighters for a February and April class, of which 197 were blacks and Hispanics. (Pet. for Cert., pp.4-5).

Comments Overheard By Crane

The City points to comments overheard by retired black district chief, Bennie Crane, who is black, which the City has altered by adding the work "minorities" in brackets to make the comment sound racial. Crane stated he heard one chief state: " 'they can make us hire them but they can't make us keep them" ' (T. 576), and heard another chief state " 'We're not going to allow them to take over this Department' " (T. 579), with no reference in either statement to minorities. In its brief, the City changes the work "them" in Crane's statements, to the word "minorities". There is nothing to show that the speakers were referring to minorities, and they may have been referring to the entire class of 1977 which had been hired under reduced standards.

There is no claim that any black or Hispanic members of the class of 1977 were terminated, and they had the benefit of the following 20 years of promotion quotas.

So far from discouraging the minorities in the 1977 class, the City actually made Crane as an instructor, where he was "assigned the responsibility to act as a consultant to ease the assimilation of the large number of minorities into the Fire Department and to consult with the instructors." (T. 576).

Crane rose to the rank of battalion chief and was appointed too exempt positions, retiring as a district chief. (T. 587-588).

Black Officers in the 50's and 60's

The City claims "thorughout the 50's and 60's the officers at the all black companies were nearly always white." (City's brief, p.9). Nevertheless, that claim is defeated by the City's own witnesses and photographs, which showed black officers were in black houses and in integrated houses, and even black officers were in white houses. (Def.Ex.99a-h, R.162-6), (T. 337-38, 348, 451-53, 457, 460-61, 465, 469-72, 473, 474, 525, 527, 533, 851, 922-923, 941, 967-69).

Efficiency Ratings For Promotions

The City claims that for the 1978 lieutenants' and captains' tests, the blacks efficiency ratings were far below whites. (City's brief, p.15). In actuality, for the 1978 promotion tests, minorities received quota promotions, so low efficiencies did not affect their advancement, and there was no adverse impact in selection rates. Even before the imposition of quotas, there was no adverse impact on the 1978 captains' test. (R. 162-2, Def.Ex.47), (R. 136-2.Pl.Ex.21-23, pp.3-4), (T. 141-154, 156-161).

Blacks did well on efficiencies before the quotas began. For the 17 promotional tests given between 1960-1973, on 12 of the tests the average efficiency rating of the black candidates were higher than the average efficiency ratings of white candidates. On the remaining 5 tests, the efficiency ratings did not have a statistically significant impact on blacks in the results of any test. (R.136-1, Pl.Ex.11.p.5; Pl.Ex.11a,p.6, excluded from evidence[1])

Prior Segregation of Fire Houses

The City points to its long ago practice of segregating firehouses as white and black houses, which was unrelated to hiring and promotions. Further, the Court of Appeals found that the practice ended in 1965, 26 years before the promotions at issue, *United States v. City of Chicago*, 573 F.2d 416, 428 (7th Cir. 1978).

The Court of Appeals found that the CFD's assignment and transfer policies did not violate Title VII. The Court sustained the district court's findings that since 1966, assignments and transfers have been based primarily on seniority, and the fact that predominantly black houses were located in predominantly black areas resulted partly from personal preferences of blacks, *Id.*, 573 F.2d at 428.

---

[1] The improper exclusion from evidence of the City's documents, and particularly its "Arimond letter", was raised in petitioners' brief in the court of appeals (points IV & XI, pp.24, 62), contrary to the City's misstatement in its present brief, (City's brief, p.2, n.1).

The City's own black witness, De la Cerna, testified he liked being assigned to a black house in 1955, and he did not seek a transfer, since it was near his home. (T. 507-08).

Individual Job Complaints of Black Witnesses

The City points to isolated, miscellaneous job complaints made by some of its black witnesses, from the 1950's and 1960's, about such things as a vandalized locker and a furlough change, unrelated to the hiring and promotion process.

The City fails to even suggest how passing over plaintiffs for promotion to captain in 1991-92, because they are white, could be considered a remedy for those job complaints.

The fact that there were so few incidents, so long ago, actually shows a lack of race problems in the CFD.

The City's witnesses themselves did not claim any past incidences affected their promotions. Most of the city's black and hispanic witnesses had stellar careers, most rose through the ranks to lieutenant, captain or battalion chief, and some were appointed to exempt (top command) positions, such as Commissioner, Deputy Commissioner, etc. (R.136-2, Pl.Ex.37, p.20-39).

The Hispanic witnesses had no complaints. A small number of the black witnesses had complaints as follows:

James Winbush is now a captain (R.149, T. 330), and did not claim the following instance negatively affected his promotions.

In 1969, unknown persons wrote "nigger" on Winbush's locker, and vandalized it. This was the only incident that was clearly race-related. The City appropriately remedied the incident, by sending a black police officer, a black police lieutenant, and an evidence technician to investigate. They determined that the wrongdoers may have been neighbors. (T. 344-346). There is no suggestion that this incident was caused or tolerated by anyone running the fire department. Further, the City transferred Winbush to Truck 42, where his father's friend, who was black, was the captain. (T. 348).

Francisco De la Cerna was promoted every time he took a promotion test to the highest rank of battalion chief, and became a Deputy Fire Commissioner. (Pl.trial Ex.37, pp.20-21). He did not claim the following instances negatively affected his promotions.

Sometime between 1963-67, De la Cerna's furlough was changed for unknown reasons, not given up as the City misstates. (City's brief, p.11). There is no indication that this furlough change was race-related. At the time, furlough were scheduled arbitrarily, not by seniority as the City misstates. (T. 511, 515, 516, 935, 936).

De la Cerna never claimed he was subject to acts of retaliation when he made a complaint about the furlough change, contrary to the City's claim. (City's brief, p.12).

The City omitted that De la Cerna testified that his complaint was remedied to his satisfaction, when he accepted, in settlement, an apology from the captain, in front of the "troops" on all 3 shifts at roll call. (T. 519, 529-532).

In 1967-68, after a transfer, De la Cerna's new captain said he would never get a company as long as he was in the second division. (City's brief, p.12). The City omits the context, namely that De la Cerna had been transferred after he had kicked garbage down the stairs in front of his former captain. He received no punishment. (T. 522-23, 525-26). The City omits that De la Cerna nevertheless did receive a permanent assignment in the second division, as an engineer, and that he stayed there, at his request, even after he was promoted to lieutenant. (T. 528-529).

Around 1962, in one incident, which the City embellishes with the use of the plural, a black fireman ate in a restaurant rather than in a house which was not his regular assignment. (T. 605,608,615). In another incident in 1965, a black fireman, who was newly assigned to a firehouse, did not get help with the dishes until after two to three months. (T. 881,885,894) (City's brief, p.12)

The City states that blacks were assigned to beds. (City's brief, p.12) Actually, beds were not assigned. A new transferee into a house took whatever bed was open, and that was his bed from then on. (T. 1045-46)

The City claims that some minorities were not given the opportunity to "act up". (City's brief, p.12) Contrary to the City's implication, there was no defined criteria, including seniority, for assigning actors. (T. 214-15, 238-39) In actuality, most of the white plaintiffs, as well as other whites, were never given the opportunity to act up, and sometimes blacks did act up. (T. 605,607,609,935,1045,1049,1055-57,1064)

"Acting up" experience has never been a component in a promotion score.

The random inclusion of Hispanics in the quotas

To defend the inclusion of Hispanics in its quotas, the City falsely argues there was evidence of hostility and animosity toward Hispanics. (City's brief, p.22) There was no such evidence, and the City fails to state what that evidence was, or to give any citation to record.

The Court of Appeals found that the City's "statistician's evidence does not suggest discrimination in the hiring of Hispanics, who until the 1980's applied for firefighters jobs at a substantially lower rate than their percentage of the relevant age group". (Pet.App. 8)

The City points to the former height requirement, which was race-neutral, and would apply to Asians, Greeks, Polish, and other ethnic groups with short males. (City's brief, p.22)

The City claims, without support from the record, that former Fire Commissioner Quinn, "let it be known that they (Hispanics) were officially unwelcome". The City points only to the testimony of James Winbush, who is black, that Quinn told Winbush, privately, that Mexicans were not tall enough to fight fires. (City's brief, p.8) Winbush never testified that any Hispanics heard this.

Furthermore, Quinn's actions brought more Hispanics into the department. The height requirement was lowered and the citizenship requirement dropped. (R.136-3, Soto dep.91) (R. 162-1, Def.Ex.12) In 1977 Quinn hired both blacks and Hispanics under 50% hiring quotas. (Pet for cert, pp. 4-5)

The City, parenthetically refers to: "(the testimony of Francisco de la Cerna regarding exclusion of Hispanics)" (City's brief, p.9) There was no such testimony. The district court made a clearly erroneous finding that "de la Cerna was told by a fire department officer that the department did not hire Mexicans and Puerto Ricans when he applied in the 1950's." (Pet.App. 26) In actuality, De la Cerna never said that a "fire department officer" made the above statement; it was a man who did not identify himself as employee of the City. This

statement was made in the *1950's*, 40 years ago. (T. 494-496, 547-548)

Hispanics were hired by the CFD. Former Commissioner Raymond Orozoco, who is Hispanic, was hired in 1959. (T. 204) (R. 136-3, Soto dep. 5, 79)

Statistical evidence

As stated above, the Court of Appeals found no statistical disparities regarding Hispanics. (Pet.App. 8)

Contrary to the City's misstatement in its brief (City's brief, p.20), its statistician, Dr. Gerry Suchanek testified that statistical disparities in regard to blacks are *not* proof of prior discrimination:

> "I have avoided saying that it's discrimination or that there is proof of discrimination. . . . " (T. 773)

Suchanek testified he had no evidence of any hiring or promotion practice that discriminated on the basis of race. (T. 796)

For hiring, the City acknowledges that it lacked the data Suchanek needed to do an analysis for the time period before applicant rates were skewed by targeted recruiting of blacks and Hispanics in the late 1960's and before hiring quotas began after 1974. The City acknowledges that prior to 1974, the City lacked applicant data. (City's brief, p. 5)

The city acknowledges that Suchanek did not tailor the general population to the qualified, interested applicant pool for hire. Suchanek used census data, which is too broad, since it includes non-citizens, illiterates, convicted felons, drug users, and persons not interested in the job. Before 1978, the CFD had a citizenship requirement. (R. 136-3, Soto Dep. 91). The CFD's entrance test required a minimal reading level. (T. 791) In and before the 1970's, the CFD disqualified applicants with certain felony convictions, including murder, rape, arson, and narcotics offenses. (T. 136-3, Soto Dep. 92-94) (T. 1057, 1045, 1048-49, 1055) (R. 136-1, Pl.Ex.3)

For promotions, the City acknowledges that it lacked racial identities of firefighters who had left the job before 1983. (City's brief, p.5, and p.5, n. 3) (T. 780-782, 788) (T.

771-72) Suchanek failed to tailor the eligible pool for promotion to the qualified applicant pool. Suchanek testified that the city failed to provide him with the reading levels of the promotion tests, to contrast with the low reading level required for entry. (T. 791-92)

In *Cox v. City of Chicago*, 868 F.2d 217, 222 (7th Cir. 1989), the city successfully argued that racial underrepresentation in upper ranks of the CFD was caused by affirmative action in the lower ranks.

For the period before 1983, the period for which Suchanek lacked accurate data, the City's own "Arimond letter", shows that from 1950 to 1987 blacks spent less time in rank before promotion than whites. For the time period that he had accurate data, namely 1983 forward, Suchanek showed that whites, not blacks, were held back in promotions. He showed that the length of time it has taken for whites to be promoted from firefighter to lieutenant and from lieutenant to captain has been longer than that for blacks. (Pet for Cert., p. 5)

II.

The City failed to explore race-neutral alternatives.

The City does not dispute that it failed to explore the race-neutral alternatives to increase the number of blacks and Hispanics in the upper ranks, such as giving promotion tests more frequently, or offer an early retirement program. The City's personnel commissioner simply concluded there was nothing he could do. (City's brief, pp. 24-26)

III.

The quotas unduly trammeled on white males.

The City misrepresents that its "goals were temporary" (City's brief, p.4)

In actuality, the City imposed both lieutenant and captain quotas since 1978, and continued race based quotas for the captains' list following the 1986 list that is at issue here. (R. 11, pars. 10 & 12), Supp. R. filed 4/23/97 for 93 C 3028 (Pet. for cert. pp.6-7)

Twenty years of quotas is not temporary, it is undue trammeling, destroying the careers of white males, particularly considering the long time between promotion tests.

The city urges that pursuant to a "wrap around agreement" with the United States, it promoted the white males passed over by quotas, and yet contradicts itself by admitting that 6 of the 9 plaintiffs were not promoted. (City's brief 3, 4, 27) There is no "wrap around agreement" in the record. The document cited by the City is its own letter, where it misrepresented to the United States that it would promote whites passed over by quota promotions. (R. 162-1, Def. Exs. 8 & 9)

IV.

The standing of 6 of the 9 plaintiffs is ripe for review.

The Court of Appeals apparently affirmed the district court's finding that 6 of the 9 plaintiffs had no standing to claim promotions, so that issue is ripe for further review, contrary to the City's position. (Pet. App. 3) (City's brief, p.29)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KIMBERLY A. SUTHERLAND
703 S. Dearborn
Chicago, IL 60605
(312) 726-0045
Counsel for Petitioners
Counsel of Record